Supreme Court, U.S.
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No. ____

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IN THE

Supreme Court of the United States

October Term, 1998

**DONALD P. O'CONNELL,
MARGARET KOSTOPULOS,
and DAWN CATUARA,**

Petitioners,

v.

ANNMARIE MILAZZO,

Respondent.

**Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that the duties actually performed by a former employee of a state official on the date of her termination provide the proper benchmark for determining whether that position is a confidential or policy making position exempt from the First Amendment's requirement of political neutrality, where that decision conflicts with the decisions of other courts of appeals, which have held that the *potential* responsibilities inherent in the position should provide that benchmark because the contrary holding, as adopted below, will handcuff newly elected officials in their efforts to implement their new policies.

2. Whether the court of appeals erred in holding, with the Third and Fifth Circuits, that the question whether plaintiff's position is a confidential or policy making position subject to political dismissals was a question for the jury at trial, where the First, Second, Fourth, and Sixth Circuits have held that this question is one of law for the court.

3. Whether a state official may be subjected to jury trial in federal court for the purported violation of a former employee's federal constitutional rights, where that official invoked the defense of qualified immunity but the court of appeals refused even to consider the defense.

PARTIES TO THE PROCEEDINGS BELOW

The following persons were parties to the proceedings in the court of appeals:

Hon. Donald P. O'Connell
Margaret Kostopulos
Dawn Catuara
Annmarie Milazzo

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Petitioners,

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ANNMARIE MILAZZO,

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Petition for a Writ of Certiorari to the
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for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners are Donald P. O'Connell, Chief Judge of the Circuit Court of Cook County, Illinois, which is the largest unified trial court system in the nation, and two members of his senior staff. They request review of a decision of the United States Court of Appeals for the Seventh Circuit reversing the summary judgment entered in their favor against respondent

Annmarie Milazzo, who was appointed Human Resources Administrator for the 550-employee Office of the Chief Judge by Chief Judge O'Connell's predecessor, who was terminated after working in that position under Chief Judge O'Connell for seven months, and who then claimed that her dismissal was politically motivated. The court of appeals rejected the district court's reliance on the uncontroverted testimony of the current Administrator detailing his confidential and policy making responsibilities—responsibilities that undeniably place the position outside the zone of protection from political dismissals. The court did so based upon respondent's unsupported argument that those duties were bestowed to strengthen Chief Judge O'Connell's position in this lawsuit—despite the absence of any evidence or even argument that the current Administrator's duties extend beyond the potential inherent in the position. The focus of the court of appeals on the position as it was performed on the date of termination—rather than on the potential inherent in the position—will put newly elected officials seeking to fulfill their electoral mandate to the intolerable choice of either laboring under the dead hand of their predecessor's personnel decisions or justifying their own personnel appointments to a jury in federal court. The decision below is contrary to our democratic process and constitutes a broad and legally unjustifiable federal intrusion into the operation of state government.

OPINIONS BELOW

The opinion below (Pet. App. 1a-10a) is reported at 151 F.3d 587 (7th Cir. 1998). The district court's opinion granting petitioners' motion for summary judgment (Pet. App. 11a-24a) is reported at 980 F. Supp. 286 (N.D. Ill. 1997). An earlier opinion of the court of appeals affirming the district court's

denial of petitioners' Rule 12(b)(6) motion to dismiss on qualified immunity grounds (Pet. App. 25a-32a) is reported at 108 F.3d 129 (7th Cir. 1996). The district court's opinion denying petitioners' motion to dismiss respondent's political patronage claim on qualified immunity grounds, and granting petitioners' motion to dismiss respondent's remaining claims (Pet. App. 33a-60a), is reported at 925 F. Supp. 1331 (N.D. Ill. 1997).

JURISDICTION

The court of appeals entered judgment on July 29, 1998. Pet. App. 1a. The court thereafter denied petitioners' timely petition for rehearing on August 31, 1998. Pet. App. 61a-62a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case presents three important questions—and two distinct circuit splits—concerning the prerogative of elected state officials to appoint capable and trusted individuals to confidential and policy making positions. The decision we respectfully ask this Court to review strikes three serious and legally indefensible blows against the ability of public officials to carry out the mandate of the electorate by shackling them to their predecessors' employees in positions with inherent confidential or policy making potential.

First, in a sharp departure from other circuits, which determine whether a position is subject to political dismissal based on the confidential or policy making *potential* inherent in the position, the court below held that the determining factor is the manner in which the position is performed on the date of

the challenged termination: "The true question is whether [respondent's] termination from the position as it was in July 1995 was improper." Pet. App. 9a.

Second, the decision below then consigned petitioners to stand trial before a jury in federal court on the question whether the position at issue is a policy making or confidential one, essentially because respondent simply alleged that her duties were ministerial and that her successor's duties were enhanced for litigation purposes. That ruling—which sets the bar so low that *any* terminated employee could clear it and force the targeted public official to trial—conflicts with the decisions of the First, Second, Fourth, and Sixth Circuits, which hold that the question whether a position is confidential or policy making in nature is a question of law for the court to decide. The ruling of the court below, which is in general agreement with the position taken by the Third and Fifth Circuits, compels public officials to the choice of living with the personnel decisions made by their predecessor or having to justify to a federal jury the personnel changes they made to improve the competency and efficiency of their office. Indeed, under this view, the more that a newly elected official's predecessor tolerated mediocrity and lack of accountability in important staff positions, the less likely it will be that the new official will attempt to institute changes for the public benefit, because in those cases in particular the official will be subject to the accusation that the duties of the position were "enhanced" after the fact.

Third, the court of appeals simply ignored petitioners' qualified immunity defense. In sending petitioners back for a damages trial before a federal jury without ever addressing their qualified immunity defense, the court of appeals silently eviscerated that defense, and the cases of this Court upon which

it rests, thereby sweeping away the last vestiges of the screening protection this Court has provided state officials from plaintiffs who seek to wield the broad power of federal laws against them.

The holding below deprives state officials of the protections this Court intended they receive from claims plaintiffs cannot back up with evidence. It thus creates disincentives to public service and fosters government performance at the lowest level.

1. Factual Background

Petitioner Donald P. O'Connell is the Chief Judge of the Circuit Court of Cook County (Supp. App. 1, Comp. ¶ 3), and petitioners Margaret Kostopulos and Dawn Catuara were members of his senior staff. R. 54, Kostopulos Aff. ¶ 1; R. 55, Wisniewski Aff. ¶ 3. Respondent Annmarie Milazzo was appointed Human Resources Administrator for the Office of the Chief Judge in 1990 by Chief Judge O'Connell's predecessor. She was terminated in mid-1995, several months after Chief Judge O'Connell's election as Chief Judge. Supp. App. 1, Comp. ¶¶ 6, 19.[1/]

Following her termination, respondent filed a complaint asserting a variety of federal claims. All but one—respondent's claim that her termination improperly was politically motivated—were dismissed at the pleading stage.[2/] Petitioners

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[1/] The following abbreviations will be used in this petition: "Supp. App." for the separately bound Supplemental Appendix accompanying respondent's brief in the court of appeals; "App." for the Appendix annexed to respondent's brief; and "R." for additional record citations.

[2/] Petitioners immediately appealed the denial of their motion to dismiss that claim on the ground of qualified immunity. The Seventh Circuit affirmed, but noted that "[o]nce the factual record is developed, the district

then moved for summary judgment, arguing that: (1) even assuming that respondent's termination was politically motivated, which it was not, hers was a confidential and policy making position that Chief Judge O'Connell was entitled to fill with an individual of his own choice; and (2) petitioners were entitled to qualified immunity.

2. The Rulings Below

In addressing petitioners' motion, the district court reviewed a variety of materials. The court first considered respondent's amended complaint, in which she acknowledged performing a number of different personnel and budgetary duties. Pet. App. 15a. In addition, the district court considered the Office's Personnel Manual—which respondent assisted in preparing during the tenure of Chief Judge O'Connell's predecessor—and found that the manual further "demonstrates the expansive nature of the Human Relations Administrator's position." Pet. App. 17a-18a. The court noted, however, that respondent had "contend[ed] . . . that she exercised no discretion or independent authority," and that she had submitted statements from former co-workers who described her duties as primarily ministerial. Pet. App. 15a-16a. Thus, the court gave particular emphasis to the uncontroverted affidavit of Bruce Wisniewski, the current Human Resources Administrator.

That affidavit, the district court concluded, shows that, "[i]n contrast to Milazzo's limited autonomy," Wisniewski "exercises broad discretionary authority in Milazzo's former position." Pet. App. 16a. He serves as one of five members of

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court may be required to revisit the qualified immunity issue." Pet. App. 31a-32a n.2.

the management team responsible for assisting Chief Judge O'Connell in running the Office; advises Chief Judge O'Connell and the senior management staff of the six other Departments of the Circuit Court of Cook County regarding personnel, employment, and labor issues; has responsibility for the Office's labor relations and collective bargaining; implements personnel policies; recommends and develops new policies; investigates infractions of Office rules; conducts interviews and makes recommendations concerning applications for clerical and administrative positions; conducts screening interviews for law clerks; coordinates the summer intern hiring program; supervises payroll; drafts portions of the budget; and acts as representative of the Office of the Chief Judge in its dealings with the staff of the President of the Cook County Board. Pet. App. 16a-17a.

Based on the foregoing evidence, the district court concluded that petitioners were entitled to summary judgment because "[t]he undisputed facts establish that Ms. Milazzo's former Human Resources Administrator position has *inherent* policymaking potential." Pet. App. 23a-24a (emphasis added). The court further held that its "decision here would *a fortiori* find that defendants are protected by qualified immunity from any damage claims that remain in this case." Pet. App. 13a n.2.

The court of appeals reversed, rejecting the district court's reliance on the broad discretionary authority of the present Human Resources Administrator. That evidence supposedly was insufficient to justify summary judgment because (1) the "true question" was whether the Administrator's position "as it was in July 1995," when respondent was still employed in that position, was confidential or policy making; (2) respondent had presented evidence that her own duties had been narrower and

less discretionary; and (3) she also had asserted in her complaint (without supplying any supporting evidence) that the new Administrator had been given broader duties to fortify petitioners' litigation position in this case. Pet. App. 9a. The court concluded that if the jury "finds that political affiliation was not a necessary requirement for the Human Resources Administrator or that defendants added responsibility to that position requiring Democratic affiliation only after this suit was filed, recovery would be warranted." *Id.* In reversing and remanding for trial, the court failed to address petitioners' alternative argument that they were entitled to qualified immunity.

Petitioners filed a petition for rehearing, which the court of appeals denied. In doing so, the court added two paragraphs to its opinion acknowledging the rule that "the mere fact that the incumbent in a position was not entrusted with policy-making authority does not preclude inquiry into whether the position itself has 'the potential for making discretionary political judgments.'" Pet. App. 62a. The court held, however, that respondent had "taken her case beyond the ambit of this principle" by alleging in her complaint that defendants changed the position's responsibilities in an effort to legitimize the removal of respondent. *Id.* Although petitioners' rehearing petition again raised the defense of qualified immunity, the court again ignored the issue.

REASONS FOR GRANTING THE WRIT

The Seventh Circuit in this case adopted a view of the law of political dismissals and qualified immunity that cannot be squared with the decisions of this Court and other circuits. Review is warranted for the following reasons.

1. The court of appeals created a split among the circuits in rejecting the district court's reliance at the summary judgment stage on the undisputed fact that respondent's successor performs confidential and policy making duties justifying consideration of political factors in his selection. The court held that the successor's job duties, although objectively viewed as a fulfillment of the potential inherent in respondent's job, should not be considered because a jury might conclude that they were made with this lawsuit in mind. But as the Sixth Circuit and other courts of appeals have recognized, "[a] newly-elected administration is surely hampered in implementing its new policies if it cannot change a position's responsibilities solely because the current incumbent does not now perform the new duties." *Faughender v. City of North Olmsted,* 927 F.2d 909, 915 (6th Cir. 1991). Under the court of appeals' approach in this case, a new executive officer would be forced to settle for keeping a predecessor's employee who is occupying a position with policy making potential but performing only clerical or administrative duties, because a jury would be authorized to treat those duties as a permanent benchmark defining the nature of the position for purposes of the constitutional protections from politically motivated dismissal. The principle adopted by the Seventh Circuit, which promotes (and perhaps compels) newly elected public officials to tolerate governmental inefficiency and nonperformance, conflicts with the decisions of other circuits that recognize the prerogative of public officials to make appointments designed to realize the full potential inherent in confidential or policy making positions.

2. The decision below contributes to a second widespread split in the circuits on the question whether the confidential and

policy making nature of a particular office is an issue for the jury or judge to decide. Some circuits hold that the question is for the jury when issues of fact are involved. *See Stegmaier v. Trammell*, 597 F.2d 1027, 1034 n.8 (5th Cir. 1979). The Seventh Circuit not only follows that rule, but applied it in this case, where respondent showed that her actual duties differed from those of the current Human Resources Administrator but failed to adduce any evidence that the additional duties of the current Administrator fall outside the scope of the potential inherent in the position. Other circuits, by contrast, hold that even where the question is fact-intensive, "important constitutional and governmental interests" render the question more appropriately committed to the judgment of a court. *See, e.g., McGurrin Ehrhard v. Connolly*, 867 F.2d 92, 93 (1st Cir. 1989) (Breyer, J.); *Danahy v. Buscaglia*, 134 F.3d 1185, 1190 (2d Cir. 1998).

3. Finally, in refusing even to address the question of qualified immunity before sending this case back for trial, the Seventh Circuit ignored the teachings of numerous decisions of this Court. Those decisions establish that public officials are entitled to qualified immunity for acts that did not violate clearly established law and to have their immunity defense considered before they stand trial. *See, e.g., Mitchell v. Forsyth*, 472 U.S. 511, 525-30 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800, 815-18 (1982). Instead of following those cases, the court below refused even to address whether it was "clearly established" that petitioners could not rely on the scope of the duties to be assigned to a successor as the benchmark for determining whether the current occupant of a position enjoyed constitutional protection from politically motivated dismissal. If the court had addressed this issue, there would have been no

need for a damages trial, because there was authority from other circuits holding that such reliance is constitutionally permissible.

The Chief Judge of the Circuit Court of Cook County holds a state constitutional office. *See* Ill. Const. Art. VI, § 7(c). In addition to hearing cases regularly, he is charged with responsibility for leading the 416 Judges of that Court, his own 550-person Office, and the almost 2,000 employees of the other six Circuit Court departments, *i.e.*, Adult Probation, Juvenile Probation, Social Services, Forensic Clinical Services, Public Guardian, and Jury Commissioners. R. 55, Wisniewski Aff. ¶ 11. Before being forced to defend his decisions concerning his staff before a jury in federal court, he deserves a fair assessment of his defense of qualified immunity.

I. The Decision Below Conflicts With The Decisions Of Other Circuits Concerning The Relevant Benchmark For Determining Whether The Occupant Of A Given Position Is Shielded From Politically Motivated Dismissal.

The Seventh Circuit's primary ruling—that the district court erred in defining the nature of the Human Resources Administrator position on the basis of the potential duties inherent in the position—impermissibly impairs the ability of elected officials to carry out their electoral mandates by shackling them to their predecessors' staff, no matter how indolent or incompetent that staff might be. In essence, the Seventh Circuit has held that regardless of the confidential or policy making potential inherent in a position, the prior position holder can sue a government official and force him to trial simply by alleging that the prior position holder's duties were

purely ministerial and that the current position holder's duties were enhanced for litigation purposes. This is the clear import of the Seventh Circuit's ruling, because that court granted respondent a jury trial on that issue *even though she has provided no evidence of such manipulative motivation other than the fact that the current holder of the position exercises broader policy making authority than she did.* Indeed, neither respondent nor the district court even suggested, much less cited evidence, that the duties of the current position holder are unusual for a Human Resources Administrator.

The Seventh Circuit's ruling makes no sense and cannot be squared with the decisions of this and other Courts. This Court has held that the First Amendment allows a government official to consider political affiliation in filling positions of a confidential and policy making nature. *See Elrod v. Burns*, 427 U.S. 347, 367 (1976); *Branti v. Finkel*, 445 U.S. 507, 517-18 (1980). That political dismissal defense should be available to a government official whenever the current occupant of a position is performing confidential or policy making duties unless the plaintiff "identif[ies] affirmative evidence," *Crawford-El v. Britton*, 118 S. Ct. 1584, 1598 (1998), that the duties bestowed upon the current position holder fall outside the inherent scope of the position. Any other conclusion would ignore the very purpose of the political dismissal defense, which is to ensure that "representative government [will] not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate." *Elrod*, 427 U.S. at 367.

To accomplish his electoral mandate, a new official may have to enhance or change the duties actually being performed by position holders in the office. A new official replacing an

autocrat who made all policy decisions alone may find key positions occupied by persons incapable of performing policy making duties. The very fact that the new official wants to reorganize his office so that those duties are performed by the person in a given position is itself a sufficient justification for considering political factors in the replacement of the prior occupant (*Faughender v. City of North Olmsted*, 927 F.2d 909, 915 (6th Cir. 1991), citations omitted):

> Permitting elected officials entrusted with administrative duties to reorganize their staffs according to their wishes is . . . derived from *Elrod* and *Branti* . . . . It should be clear that policies can only be implemented with the help of staff persons entrusted to carry out certain tasks. A newly-elected administration is surely hampered in implementing its new policies if it cannot change a position's responsibilities solely because the current incumbent does not now perform the new duties.

Under the Seventh Circuit's rule, rather than carry out the mandate of the electorate, many officials will shy away from legitimate reforms because every prior position holder will be able to obtain a jury trial on the question whether her duties, as opposed to the duties of the current position holder, are the proper benchmark defining the nature of the position. Indeed, under the Seventh Circuit's approach, the greater the prior administration's tolerance of nonperformers in positions with real confidential or policy making potential, the lesser the successor's incentive to change the status quo because the prior position holder's low level of performance will always provide the means to force the reform-minded public official to trial by jury. That this is the logical consequence of the Seventh Circuit's decision is confirmed by the court's suggestion that

the constitutional analysis should turn on whether the subjective reason for enhancing the duties of the new position holder was to create a better defense in the lawsuit. *See* Pet. App. 62a ("If plaintiff's case be proved, then defendants fired her from a position that had never (at least in recent memory) had policy-making responsibilities, then added such powers to the job in an attempt to legitimize the firing. In these circumstances, plaintiff has shown enough to warrant a jury trial."). Resort to a subjective standard all but ensures that government officials will have to explain each of their staffing decisions to a jury.

Given that under *Elrod* and *Branti*, a government official legitimately may (1) decide to require the holder of a position to perform all of the policy making and confidential duties inherent in the position, (2) bring in a new employee capable of satisfying that requirement, and (3) consider political factors in selecting this new employee, it cannot make sense to allow the prior position holder's suit to go to a jury on nothing more than evidence that the current position holder's duties exceed hers. That reality is well recognized in the holdings of the First, Second, Third, Sixth, Eighth, and Tenth Circuits, with which the decision below is in conflict, that regardless of a former position holder's actual past duties, the position will be subject to political dismissals if there is confidential or policy making potential inherent in the position. *E.g.*, *Mendez-Palou v. Rohena-Betancourt*, 813 F.2d 1255, 1258 (1st Cir. 1987) (court's emphasis) ("the *actual* past duties of the discharged employee are irrelevant if the position *inherently* involves more expansive powers and more important functions"); *Regan v. Boogertman*, 984 F.2d 577, 580 (2d Cir. 1993) ("[W]e do not look merely at her actions taken while in office. Rather, we also look at the power with which she is vested by law, and which

is inherent in the office"); *Brown v. Trench*, 787 F.2d 167, 168 (3d Cir. 1986) ("The relevant inquiry is to the function of the public office in question and not the actual [past duties of the particular employee] involved"); *Stott v. Haworth*, 916 F.2d 134, 142 (4th Cir. 1990) (same); *Williams v. City of River Rouge*, 909 F.2d 151, 154 (6th Cir. 1990) ("the relevant focus of analysis is the inherent duties of the position in question, not the work actually performed by the person who happens to occupy the office"); *Bauer v. Bosley*, 802 F.2d 1058, 1064 (8th Cir. 1986) (because of the inherent policy making character of position, the "position [was] exempt from the prohibition against political terminations, regardless of whether [plaintiff] himself performed such functions"), *cert. denied*, 481 U.S. 1038 (1987); *Green v. Henley*, 924 F.2d 185, 186 (10th Cir. 1991) (citation omitted) ("if an officeholder performs fewer or less important functions than usually attend his position, he may still be exempt from the prohibition against political terminations if his position inherently encompasses tasks that render his political affiliation an appropriate prerequisite for effective performance").

An illustrative application of the principle enunciated in these cases is found in the Sixth Circuit's decision in *Blair v. Meade*. Plaintiffs, two employees of a former judge executive responsible for administering the local trial courts, claimed that the newly-elected judge executive terminated them because of their political affiliations. One of the employees formerly was the purchasing agent and chief financial officer, and the other employee formerly was the bookkeeper and assistant to the financial officer. 76 F.3d 97, 99 (6th Cir. 1996). The district court denied defendant's motion for summary judgment, but the Sixth Circuit reversed, holding that both positions had policy

making potential even though many of plaintiffs' actual duties were ministerial. *Id.* at 101. The Sixth Circuit reasoned (*id.*, internal quotations omitted, emphasis added):

> [E]mployees' duties may vary from one administration to the next. *If we were to fashion a rule limiting [the new judge executive's] ability to fire such employees, we would in effect allow a prior judge executive to define for his successors how the office is run. Such a rule would hamper the new administration's ability to implement its policies.* . . . A newly-elected administration is surely hampered in implementing its new policies if it cannot change a position's responsibilities solely because the current incumbent does not now perform the new duties.

In sharp conflict with *Blair* and the other decisions just cited, the court of appeals held that because respondent's position was treated as ministerial by Chief Judge O'Connell's predecessor, and because respondent had made the bare allegation that Chief Judge O'Connell enhanced the duties of the position as a litigation stratagem, respondent had alleged enough to take her case to a jury. Pet. App. 9a. But respondent never argued, and the court below never held, that any of the current Administrator's duties exceeded the potential inherent in the position. Further, it can hardly be disputed that the position of Human Resources Administrator in a 550-person office carries with it at least the inherent potential to involve confidential and policy making duties. Indeed, a number of courts of appeals, dealing with comparable positions, have so held. *See, e.g.*, *Flynn v. City of Boston*, 140 F.3d 42, 45 (1st Cir. 1998) (affirming district court's grant of summary judgment directed at claim of associate director of administration and finance who had authority over "human

resource issues"); *Kaluczky v. City of White Plains*, 57 F.3d 202, 208 (2d Cir. 1995) (reversing district court's denial of motion to dismiss claim of personnel director); *Cordero v. De Jesus-Mendez*, 867 F.2d 1, 12 (1st Cir. 1989) (affirming district court's grant of judgment notwithstanding the verdict directed at claim of personnel director).

The decision below embraces a political dismissal rule that forces government officials to the Hobson's choice between (1) living with the policy judgments and staffing decisions made by their predecessors, or (2) being dragged through litigation for refusing to do so. Worse yet, the decision below deprives government officials of "summary judgment . . . as the ultimate screen to weed out truly insubstantial lawsuits prior to trial," *see Crawford-El*, 118 S. Ct. at 1588, by sending a case to trial in which the plaintiff has shown nothing more than some difference between her duties and those of the current position holder. Review is warranted to resolve the circuit conflict created by the decision below, and to clarify that the law of political dismissals cannot and should not be construed as forcing public officials to this intolerable choice.

II. The Decision Below Contributes To A Widespread Circuit Conflict Concerning Whether A Judge Or Jury Should Decide Whether A Particular Office Is Subject To Political Dismissals.

In holding that the question whether the position of Human Resources Administrator is subject to political dismissal is a question to be decided by a jury, the decision below also contributes to another conflict among the circuits. The Seventh Circuit has previously held that a determination about whether a particular position falls into the category of jobs not shielded

from political dismissals is a question of fact. *See Soderbeck v. Burnett County, Wisconsin*, 752 F.2d 285, 288 (7th Cir.) ("The defendants argue that whether or not an employee exercises a policy-making role or is a repository of confidences that make loyalty an essential part of his job description should always be a question of law, but we cannot agree with this point, for which no authority is offered."), *cert. denied*, 471 U.S. 1117 (1985). The court below took that position to its most illogical extreme—returning the case for presentation to a jury even though the relevant objective circumstances were essentially undisputed, on the theory that the subjective motivation underlying the change in job duties could alter the constitutional calculus.

Two other circuits, the Third and the Fifth, also hold that a jury should decide whether a position is of a policy making or confidential nature, at least where the facts are in dispute. *See Rosenthal v. Rizzo*, 555 F.2d 390, 394 n.5 (3d Cir.) ("[T]he determination of status as a policymaker *vel non* presents a difficult factual question. Where there is evidence to support the employee's claim that he does not make policy, as there is here, he is entitled to a full trial on the issue."), *cert. denied*, 434 U.S. 892 (1977); *Stegmaier v. Trammell*, 597 F.2d 1027, 1034 n.8 (5th Cir. 1979) ("Courts have uniformly interpreted this passage to mean that the question of whether an employee is a policymaker or falls within the policymaker, confidential employee exception to *Elrod* is a question of fact.").

Other circuits, by contrast, treat the issue as one of law. For example, in *McGurrin Ehrhard v. Connolly*, 867 F.2d 92 (1st Cir. 1989), a decision written by then-Judge Breyer, the First Circuit held that the question was one for the court to decide

because of the "important constitutional and governmental interests" involved (*id.* at 93, citations omitted):

> In this case, we have taken the basic facts from the record, determining what happened by viewing the evidence in a light favorable to the plaintiff. . . . Whether those facts demonstrate a job that falls within the *Elrod-Branti* "party affiliation" exception, however, is a question of law.

Accord Flynn v. City of Boston, 140 F.3d 42, 44 (1st Cir. 1998); *Ortiz-Pinero v. Rivera-Arroyo*, 84 F.3d 7, 11 (1st Cir. 1996).

The Second, Fourth, and Sixth Circuits have joined the First. *Danahy v. Buscaglia*, 134 F.3d 1185, 1191 (2d Cir. 1998) ("[T]he district court erroneously concluded that the policy maker inquiry was for the jury . . . . [T]his Court [has] explained that such inquiry presents a question of law informed solely by the job description and the powers of office."); *Jones v. Dodson*, 727 F.2d 1329, 1336 (4th Cir. 1984) ("Whether [the *Elrod-Branti*] justification is established presents an ultimate issue of law for the court, paralleling the justification issue in *Pickering* expressive conduct cases"); *Mumford v. Basinski*, 105 F.3d 264, 271 (6th Cir.) ("Although the inherent duties of a state public officer are generally delineated by state law, the unique duties of a particular office holder are typically fact driven. However, the characterization of the position's general or specific duties as nonpolitical or political is a question of law."), *cert. denied*, 118 S. Ct. 298 (1997).

Courts in the Eighth, Ninth, and Tenth Circuits have recognized the existence of the circuit conflict, but have not weighed in on the issue. *See Horton v. Taylor*, 767 F.2d 471, 478 (8th Cir. 1985) ("we are aware that courts disagree about whether such determinations are matters of fact or of law"); *see*

also Soelter v. King County, 931 F. Supp. 741, 743 n.3 (W.D. Wash. 1996), *aff'd without opinion*, 132 F.3d 40 (9th Cir. 1997); *Dickeson v. Quarberg*, 844 F.2d 1435, 1443 n.7 (10 Cir. 1988).

As numerous decisions, including then-Judge Breyer's *McGurrin* opinion, establish, "the important constitutional and governmental interests" involved militate in favor of treating the issue as one of law. Review is warranted to resolve the conflict among the circuits on this important issue of federal law.

III. The Decision Below Violates This Court's Qualified Immunity Precedents.

Exacerbating the abdication of the court's role in screening cases against public officials was the Seventh Circuit's absolute refusal to address the question of qualified immunity before sending the case back for trial. The district court, after ruling that petitioners' conduct was not constitutionally barred, said that it therefore "need not address defendants' alternate argument that qualified immunity shields them from the damages sought in plaintiff's suit," but commented that its "decision here would *a fortiori* find that the defendants are protected by qualified immunity." Pet. App. 13a & n.2. When the court of appeals reversed the district court's holding at the summary judgment stage that petitioners' conduct was fully lawful, the issue of qualified immunity naturally arose again. The next logical question was whether any "clearly established" law would have precluded petitioners' reliance on the nature of the duties to be assigned to the new Human Resources Administrator in deciding that it was appropriate to consider political factors in filling that position. The court of appeals,

however, simply did not address that issue—even after having this glaring omission pointed out upon rehearing.[3/]

As a result of the decision below, petitioners find themselves in an extraordinary, if not unprecedented, position. The only federal court to consider petitioners' defense of qualified immunity upon summary judgment was the district court. That court determined that its decision *a fortiori* would require the conclusion that petitioners are immune from respondent's damage claims—and thus are, at most, subject to a nonjury trial on respondent's claim for reinstatement. Without even mentioning qualified immunity, however, the court of appeals consigned petitioners to a jury trial on respondent's claims for reinstatement *and* damages. That result violates this Court's qualified immunity precedents.

First, the decision below effectively collapses the question whether respondent has stated an actionable constitutional claim with the question whether petitioners are entitled to qualified immunity. This Court's qualified immunity decisions, however, establish that there are actually two components to the analysis:

[3/] As noted above (*see* pages 5-6 note 2), petitioners previously had raised the defense of qualified immunity in a motion to dismiss. That motion, which necessarily relied solely on respondent's description of her duties in her original complaint, was denied by the district court and that denial was affirmed by the Seventh Circuit in an earlier appeal. When the issue was presented to the court of appeals again in this appeal from a grant of summary judgment, however, the facts before the court were much different. For the first time, petitioners were able to rely on the undisputed description of the duties of the current Human Resources Administrator, and the legal argument that those duties properly define the nature of respondent's position for constitutional purposes. Thus, the Seventh Circuit could not simply have relied on its previous ruling in refusing to address the question of qualified immunity in this appeal.

(1) whether plaintiff has set out a violation of the Constitution; and (2) whether the constitutional standards were "clearly established" at the time of the alleged violation. *See, e.g.*, *County of Sacramento v. Lewis*, 118 S. Ct. 1708, 1714 n.5 (1998); *Siegert v. Gilley*, 500 U.S. 226, 232 (1991).

At most, the court of appeals addressed whether the alleged conduct set out a constitutional violation. The court did not address whether the constitutional standards were "clearly established" at the time of respondent's removal from office. That is an error that is outcome-determinative in this case, because at no point did respondent or the court of appeals cite any authority remotely suggesting that it was clearly established that petitioners' conduct amounted to a violation of the Constitution. That omission is not surprising, because prior circuit court decisions upholding terminations of like position holders in *Blair*, 76 F.3d at 101 (6th Cir. 1995), *Kaluczky*, 57 F.3d at 208 (2d Cir. 1995), and *Cordero*, 867 F.2d at 12 (1st Cir. 1989), dictate the *opposite* conclusion.

Second, by ordering petitioners—including the Chief Judge of the Circuit Court of Cook County—to trial without considering their claim of qualified immunity, the court of appeals contravened the very purpose of the doctrine of qualified immunity as outlined in this Court's prior decisions. This Court fashioned the qualified immunity defense to avoid the costs imposed by meritless suits on governmental officials and society as a whole through "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). As this Court emphasized recently in *Behrens v. Pelletier*, 516 U.S. 299, 308 (1996), because discovery "'[i]nquiries . . . can be peculiarly

disruptive of effective government,'" a government official should not be subject to them unless the plaintiff first makes a credible case that the law supporting the alleged constitutional claim was "clearly established" at the time of the challenged conduct.

Those universal considerations are all the more true here, where the principal state official involved is the Chief Judge of the Circuit Court of Cook County. The case law makes clear the importance of having close working relationships within the offices of a judicial officer. *See, e.g., McDaniel v. Woodard*, 886 F.2d 311, 316 (11th Cir. 1989) ("Judge Woodard's ability to carry out his public responsibilities would likely be impaired if he were forced to retain a secretary whose loyalty he questioned."); *Balogh v. Charron*, 855 F.2d 356, 356-57 (6th Cir. 1988) ("Judges must be able to rely on the confidentiality of the relationship with [their] aides, just as they must rely on the confidentiality of their relationship with their private secretaries and law clerks.").

The court of appeals never even considered whether the law was clearly established in reversing the district court's grant of summary judgment. By refusing to do so, and by instead forcing Chief Judge O'Connell and his fellow defendants to trial by jury without addressing qualified immunity, the court of appeals' decision promotes—rather than prevents—the very evils that this Court's qualified immunity decisions remedy. Review is warranted to conform the result in this case with the law of qualified immunity.

* * * *

In sum, in a sharp departure from the holdings of many other courts of appeals, the Seventh Circuit adopted a rule that

impermissibly prevents state officials from filling confidential or policy making postions with capable and trusted individuals, by concluding that the propriety of a political dismissal must be determined not by the potential inherent in the position, but by how the position was performed at the time of the challenged termination. Moreover, in holding that this question is for the jury to decide at trial, the Seventh Circuit contributed to another widespread circuit conflict, departing from those circuits which hold that the confidential or policy making character of a position must be decided by the court and not by a jury. Finally, in the process of contributing to multiple circuit splits, the Seventh Circuit simply ignored petitioners' qualified immunity defense, thereby abdicating its essential role in screening cases against public officials before requiring them to divert their time, energy, and resources from their public duties to defending their staffing decisions at trial. In these circumstances, certiorari review is not only appropriate, but essential.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: October 19, 1998

APPENDICES

APPENDIX A

In The
United States Court of Appeals
for the Seventh Circuit

No. 97-4217

ANNMARIE MILAZZO,

Plaintiff-Appellant,

v.

DONALD P. O'CONNELL, MARGARET KOSTOPULOS and DAWN CATUARA, individually and as employees of the Office of the Chief Judge of the Circuit Court of Cook County,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 95 C 5342-**Ruben Castillo, *Judge*.**

SUBMITTED JUNE 4, 1998*/-DECIDED JULY 29, 1998

Before POSNER, *Chief Judge*, CUMMINGS and CUDAHY, *Circuit Judges*.

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*/ This successive appeal has been submitted to the original panel under Operating Procedure 6(b). After examination of the briefs and the record, we have concluded that oral argument is unnecessary; accordingly, the appeal is submitted on the briefs and the record. See Fed. R. App. P. 34(a); Cir. R. 34(f).

PER CURIAM. In September 1995 Annmarie Milazzo filed a four-count complaint with jury demand against Donald P. O'Connell, Chief Judge of the Circuit Court of Cook County, Illinois, and two members of his staff. The district court granted defendants' motion to dismiss Counts I, III and IV but refused to dismiss Count II, which alleged that plaintiff's employment was terminated in violation of the First and Fourteenth Amendments because of her lack of political sponsorship.

Plaintiff Annmarie Milazzo was Human Resources Administrator in the Office of the Chief Judge from 1990 to 1995. In addition to Judge O'Connell the following defendants were named: Margaret Kostopulos, Administrative Director (or Acting Administrative Director) of the Office of the Chief Judge of that court, and Dawn Catuara, an administrative assistant to Chief Judge O'Connell.

In 1990 plaintiff became Administrator of the Personnel Department of the Circuit Court. In 1994 the Personnel Department was renamed the Human Resources Department. Plaintiff asserted that her duties were to implement the personnel policies adopted by the Chief Judge and his immediate staff. In December 1994, Judge O'Connell succeeded Judge Harry G. Comerford as Chief Judge of the Circuit Court. Later that month plaintiff met with Judge O'Connell and discussed the activities of herself and her department. From that point through March 1995 she had frequent contacts with Judge O'Connell.

On January 30, 1995, defendant Catuara became administrative assistant to Judge O'Connell. Plaintiff alleges that for several months thereafter defendant Catuara "relied heavily on plaintiff" but also gave her contradictory instructions

and criticized her for "taking actions that defendant Catuara had explicitly directed plaintiff to perform, but which resulted in problems." In February 1995 Judge O'Connell allegedly directed defendant Catuara to eliminate testing and interviewing procedures for prospective employees in order to hire new employees based upon their political sponsorship. Defendant Catuara criticized plaintiff because Catuara was embarrassed when unable to answer questions by Judge O'Connell about the political sponsorship of certain applicants for the summer job program and falsely blamed her own inadequacies on plaintiff. In July 1995 defendant Catuara told plaintiff that Judge O'Connell decided to transfer plaintiff to a lesser position, resulting in a $14,000 annual salary reduction.

On July 17, 1995, plaintiff's attorney contacted the Chief Judge's office about her demotion or reassignment and was told by defendant Kostopulos that there would be no reconsideration. The next day plaintiff met with Kostopulos and told her she was accepting the lesser position under protest. However, later the same day Kostopulos called plaintiff and said that Judge O'Connell wanted to know what "under protest" meant and whether she would accept the new position "without reservations." Although plaintiff accepted these terms, the next day she received a letter from Kostopulos informing plaintiff that her position was terminated that day without an opportunity to be heard.

In September 1995 plaintiff filed her four-count complaint and the following April Judge Castillo granted defendants' motion to dismiss Counts I, III and IV but denied the motion as to Count II and also denied the motion as to qualified immunity under Count II. According to that Count, defendants' employment practices depended on the political sponsorship of

an employee, and merit-testing procedures were abolished. Defendants supposedly based all personnel decisions predominantly on the basis of political sponsorship and plaintiff was terminated because of her lack of that sponsorship. In its opinion, the district court pointed out that under *Elrod v. Burns*, 427 U.S. 347, a public employer's decision to terminate an employee on the ground of political affiliation infringes her First Amendment rights unless the defendant can demonstrate that the dismissed employee occupied a policymaking or confidential position. 427 U.S. at 367. Therefore the motion to dismiss Count II was denied. We affirmed. 108 F.3d 129 (1997).

In June 1997 plaintiff filed an amended complaint which repeated many of the allegations of Count II of her original complaint. Thereafter, in paragraphs 28 through the termination of the amended complaint, plaintiff alleged as follows:

> 28. Plaintiff realleges and incorporates herein by reference paragraphs 1 through 32 [sic], above.
>
> 29. Defendant O'Connell, acting with the assistance of defendants Catuara and Kostopulos, employed a practice of hiring, re-assignment, promotion, and termination in the Office of the Chief Judge in which the necessary and predominant criteria for hiring, promotion, re-assignment or promotion was the political sponsorship of an employee.
>
> 30. As set forth in paragraph 15, above, merit testing procedures were abolished by defendant O'Connell.
>
> 31. Before taking any personnel action, defendant O'Connell, with the frequent assistance of defendants Catuara and Kostopulos, determined who the political

sponsor of an employee was, and made all personnel decisions based predominantly on that consideration.

32. Plaintiff Milazzo had no political sponsor. For several months after Judge O'Connell became Chief Judge and after defendant Catuara became his assistant, plaintiff was told she was doing a good job, because her expertise was needed while defendants O'Connell and Catuara familiarized themselves with the office. Once they had done so, plaintiff became expendable because she did not have political sponsorship, and defendants proceeded to demote and/or terminate her for her lack of political sponsorship.

33. Defendants therefore demoted and/or terminated plaintiff in violation of her rights under the First and Fourteenth Amendments to the Constitution of the United States not to have her employment terminated due to her lack of political affiliation.

34. As a direct and proximate result of the acts and omissions of defendants, plaintiff has suffered and will continue to suffer monetary losses, emotional distress, and embarrassment and humiliation.

35. Defendants acted with evil intent and callous indifference to the rights of plaintiff Milazzo.

WHEREFORE, Plaintiff Annmarie Milazzo prays that this Court:

A. Find that defendants O'Connell, Catuara, and Kostopulos are guilty of and liable for the deprivation of plaintiff's First and Fourteenth Amendment rights.

B. Enter a judgment in plaintiff's favor and against defendants O'Connell, Catuara, and Kostopulos; order plaintiff reinstated to her position as Human Resources Administrator in the Office of the Chief Judge; and award plaintiff:

I. Compensatory damages as shall be proven at trial;

II. Punitive damages as shall be proven at trial;

III. Plaintiff's attorney's fees herein pursuant to Title 42, U.S.C. § 1988;

IV. Plaintiff's costs herein; and

V. Such further relief as the Court deems just and proper.

In October 1997 Judge Castillo handed down his second Memorandum Opinion and granted defendants' motion for summary judgment on the amended complaint. He concluded that political affiliation was a proper consideration for the position of Human Resources Administrator, resulting in this second appeal.

Plaintiff now contends that the facts did not show that she was a confidential and policymaking employee. Judge Castillo rejected plaintiff's arguments that the nature of the position was administrative and that only after this lawsuit was filed did defendants give the Human Resources Administrator position additional duties "in a transparent attempt" to endow that office with duties that could be characterized as policymaking and confidential in order to prevail in this case.

As plaintiff has shown, she was not terminated until after she consulted an attorney about her pending demotion or reassignment. Shortly thereafter she received the letter stating that her employment was terminated.

In its first opinion in this case, the district court held that plaintiff's claim that she was fired because of her political affiliation in violation of her First Amendment rights stated a claim because it was unclear that "any reasonable government official would have believed that Milazzo held a position for which political loyalty was required." Consequently the court refused to hold that defendants had qualified immunity under Count II of the original complaint. We affirmed. 108 F.3d 129. After we affirmed the district court's first judgment, the matter came before Judge Castillo again on defendants' motion for summary judgment as to plaintiff's amended complaint which elaborated on the original Count II. In its opinion granting that motion, the district court concluded that political affiliation was a proper consideration for the position of Human Resources Administrator, so that summary judgment for defendants was warranted.

On the remand, plaintiff contended that she exercised no discretion or independent authority in executing her tasks of "handling the payroll for the Office of the Chief Judge, maintaining the personnel files of the employees of the Office of the Chief Judge, recording the personnel actions taken by the supervisors of the various units of the Office of the Chief Judge, processing the hiring of new employees in the Office of the Chief Judge and assisting in the preparation of the budget of the Office of the Chief Judge by participating in the preparation of the forms and other documents that must be prepared to support

the budget decisions made by the Chief Judge."[1/] Milazzo did supervise the testing of applicants for clerical and administrative positions and conducted interviews for new applicants for clerical and secretarial positions. While she compiled the Office's Personnel Manual, she denied any input into the formulation of policy for that Manual and denied "playing a role in the substantive personnel actions taken within unionized and nonunionized Circuit Court departments."[2/]

Plaintiff also offered affidavits showing the limitations of her position as supervisor of the administrative functions of the Human Resources Department. She could neither hire nor fire employees nor enter into contracts on behalf of the Department. Her immediate successor resigned "to seek a position with more authority and discretion."[3/]

The district court judge noted that the present Human Resources Administrator exercises broad discretionary authority. The court observed that the current Personnel Manual demonstrates the expansive nature of the present Human Resources Administrator. In addition, the district court relied on the Personnel Manual of the Human Resources Department as demonstrating "the expansive nature of the Human Relations Administrator's position."

Judge Castillo concluded that "The undisputed facts establish that Ms. Milazzo's former Human Resources Administrator position has [now] inherent policy making

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1/ Second memorandum opinion and order, pp. 4-5

2/ *Ibid.* p. 5.

3/ See note 2.

potential" and that political affiliation is a reasonable requirement of that position, so that plaintiff's job termination did not violate the Constitution.[4/] But that is not the proper inquiry. The true question is whether her termination from the position as it was in July 1995 was improper. Sufficient facts have been set forth in the amended complaint to show that a jury should have been permitted to decide this question. If it finds that political affiliation was not a necessary requirement for the Human Resources Administrator or that defendants added responsibility to that position requiring Democratic affiliation only after this suit was filed, recovery would be warranted. *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712; *Branti v. Finkel*, 445 U.S. 507; *Elrod v. Burns*, 427 U.S. 347; *Illinois State Employees Union v. Lewis*, 473 F.2d 561 (7th Cir. 1972), *certiorari denied*, 410 U.S. 928.

Reversed and remanded; pursuant to Circuit Rule 36, the case is to be assigned to a different judge on remand.

CUDAHY, *Circuit Judge*, concurring in the result. I do not believe that Judge Castillo misconceived the applicable law nor did he fail to make "the proper inquiry," as the majority asserts. He did not find, as the majority suggests, that the duties of the current Human Resources Administrator were dispositive; instead he relied on the present scope of the position as *one* indicator of the job held by Milazzo. *See*, District Court Opinion at 12. ("Rather, we find that the office was *always* endowed with the potential for making discretionary political judgments.") (emphasis added).

4/ See p. 12 of opinion below.

I believe, however, that there may be a genuine issue of fact as to whether political affiliation was an appropriate criterion for the position of Human Resources Administrator. I therefore concur in the result.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANNMARIE MILAZZO,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 95 C 5342
	)	
DONALD P. O'CONNELL, MARGARET KOSTOPULOS, and DAWN CATUARA, individually and as employees of the Office of the Circuit Court of Cook County,	)	Judge Ruben Castillo
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff Annmarie Milazzo filed suit against defendants Donald P. O'Connell, Chief Judge of the Circuit Court of Cook County, Illinois; Margaret Kostopulos, Administrative Director of the Office of the Chief Judge; and Dawn Catuara, Administrative Assistant to the Chief Judge, for damages arising from Milazzo's termination as Human Resources Administrator[1/] for the Circuit Court of Cook County. Milazzo worked as the Human Resources Administrator initially under Chief Judge Harry Comerford and then under Chief Judge O'Connell. Milazzo contends that shortly after O'Connell took

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1/ The position of "Administrator of the Personnel Department" was retitled "Human Resources Administrator" in 1994. For purposes of clarity, this opinion will use the title "Human Resources Administrator" to refer to both positions.

office, defendants terminated her for lack of political sponsorship in violation of the First and Fourteenth Amendments, as well as Illinois state laws prohibiting retaliatory discharge.

Milazzo incorporated these allegations into a four count complaint. Count I alleged that Milazzo's abrupt termination violated the Office's Personnel Manual and the custom of informing an employee of complaints against her and providing her with the opportunity to be heard before termination. Count II claimed defendants terminated Milazzo due to her political affiliation in violation of the First Amendment. Count III charged that defendants further violated Milazzo's First Amendment rights by terminating Milazzo in retaliation for consulting with an attorney. Count IV reasserted the allegations in Count III, but was fashioned under state common law prohibitions against retaliatory discharge.

In a prior opinion, the Court granted defendants' motion to dismiss all counts of plaintiff's complaint with the exception of the First Amendment claim detailed in Count II. *Milazzo v. O'Connell*, 925 F. Supp. 1331 (N.D. Ill. 1996). We found that Count II articulated a sufficient cause of action by alleging Milazzo occupied a purely ministerial, as opposed to confidential or policymaking, position protected from patronage firings under the First Amendment. *Id.* at 1343-44. The Seventh Circuit affirmed this court's judgment in an opinion released on January 13, 1997, stating that defendants failed to demonstrate that the nature of Milazzo's position justified her termination. *Milazzo v. O'Connell*, 108 F.3d 129, 132 (7th Cir. 1997).

This matter is currently before the Court on defendants' motion for summary judgment on Count II of plaintiff's complaint. Defendants contend that the facts establish that political affiliation is an appropriate criterion for the confidential and policymaking position of Human Resources Administrator. Because we find that political affiliation is a proper consideration for the position of Human Resources Administrator, we need not address defendants' alternate argument that qualified immunity shields them from the damages sought in plaintiff's suit.[2/] Accordingly, defendants' motion for summary judgment is granted.

LEGAL STANDARDS

Summary judgment is proper if the record reveals no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 40 F.3d 146, 150 (7th Cir. 1995). A genuine issue for trial exists only when the "evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The court must view the evidence in a light most favorable to the nonmoving party, drawing all reasonable inferences in the nonmovant's favor. *Cincinnati Ins.*, 40 F.3d at 150. However, if the evidence is

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2/ Our decision here would a fortiori find that the defendants are protected by qualified immunity from any damage claims that remain in this case. However, we also note that Milazzo recently amended her complaint to include a prayer for prospective relief in addition to the punitive and compensatory damages and attorneys fees sought in the original complaint. While qualified immunity shields public officials sued for civil damages, the doctrine of qualified immunity as advanced by defendants would not bar an award of prospective relief. *See Hernandez v. O'Malley*, 98 F.3d 293, 297 (7th Cir. 1996).

merely colorable, or is not significantly probative, or merely raises "some metaphysical doubt as to the material facts", summary judgment may be granted. *Liberty Lobby*, 477 U.S. at 261. In ruling on the motion, the court must be mindful of the jury's province, reserving credibility determinations and the weighing of the evidence for the trier of fact.

FACTUAL BACKGROUND

We start by presenting the facts in the light most favorable to the plaintiff.[1] As this Court has set forth the facts giving rise to Milazzo's termination in our prior opinion, we will not repeat them here. Furthermore, while defendants do not concede to firing Milazzo for her political affiliations, defendants do not challenge plaintiff's ability to demonstrate this for purposes of

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1/ The facts are derived from statements that the parties filed with this Court under the Northern District of Illinois' Local General Rule 12(M)-(N). Rule 12(M)(3) requires a party moving for summary judgment to file "a statement of material facts as to which the moving party contends there is no genuine issue." The movant's statement must contain "specific references to affidavits, parts of the record, and other supporting material relied upon to support the facts set forth." Rule 12(M)(3). Defendants' statement is cited as "Defs. Facts ¶ __." Similarly, Rule 12(N)(3)(a) requires the non-moving party to file a concise response to the movant's statement including, in the case of any disagreement, specific references to supporting materials. Milazzo's response is cited as "Pl.'s Facts ¶ __." Rule 12(N)(3)(b) authorizes the non-moving party to submit a statement of "additional facts that require the denial of summary judgment"; under Rule 12(M), the moving party may then submit a reply to the non-moving party's additional facts. Milazzo's statement of additional facts is cited as "Pl.'s Add'l Facts ¶ __.", and the defendants' reply is cited as "Defs. Resp. Add'l Facts ¶ __." All properly supported material facts set forth in either party's statements are deemed admitted unless properly controverted. See Local Rule 12(M) and (N)(3)(b); *see also Flaherty v. Gas Research Inst.*, 31 F.3d 451, 453 (7th Cir. 1994). Moreover, the mere denial of a particular fact without specific references to affidavits, parts of the record, and other supporting materials is insufficient, and, where a properly supported factual assertion is met with such a naked denial, the fact may be deemed admitted. *Flaherty*, 31 F.3d at 453.

their motion.[4/] Accordingly, our discussion will be limited to those facts pertaining to the central inquiry in the case, the nature of the Human Resources Administrator position.

In her amended complaint, plaintiff describes her duties as implementing the personnel policies as adopted by Judge O'Connell (Pl.'s Amnd. Cmplnt. ¶ 10) and assisting the Executive Officer of the Office of the Chief Judge with budget and payroll account matters. Pl.'s Amnd. Cmplnt. ¶ 18. Milazzo states that she had "frequent contact with Chief Judge O'Connell performing various assignments and providing him with various information," and that defendant Catuara "relied heavily upon plaintiff." Pl.'s Amnd. Cmplnt. ¶ 13-14. Milazzo was responsible for "handling the payroll for the Office of the Chief Judge, maintaining the personnel files of the employees of the Office of the Chief Judge, recording the personnel actions taken by the supervisors of the various units of the Office of the Chief Judge, processing the hiring of new employees in the Office of the Chief Judge and assisting in the preparation of the budget of the Office of the Chief Judge by participating in the preparation of the forms and other documents that must be prepared to support the budget decisions made by the Chief Judge." Pl.'s Facts ¶ 7. Milazzo contends, however, that she exercised no discretion or independent authority in executing these tasks. Milazzo states she "supervised the testing of applicants for clerical and administrative positions, and conducted interviews for many of the applicants for clerical and secretarial positions." Pl.'s Aff. ¶ 4. Milazzo admits compiling

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4/ Milazzo need not prove that the sole reason for defendants' unfavorable action was political affiliation, merely that political affiliation was one factor in the dismissal. *Nekolny v. Painter*, 653 F.2d 1164 (7th Cir. 1981).

the Office's Personnel Manual, but denies any input into the formulation of such policy. In addition, Milazzo denies playing a role in the substantive personnel actions taken within unionized and nonunionized Circuit Court departments.

Milazzo also offers the affidavit of Thomas F. Cunningham, former Executive Officer in the Office of Chief Judge Comerford. Cunningham states that Milazzo was responsible for maintaining personnel files, preparing correspondence, and preparing the Annual Budget Request based upon information supplied by others. Cunn. Aff. ¶ 4. Cunningham testifies that Milazzo could neither hire nor fire employees, nor enter into contracts on behalf of the Office. Cunn. Aff. ¶ 5. Similarly, Donna Sass, Milazzo's former administrative assistant, describes Milazzo's responsibilities as supervising the administrative functions of the Human Resources Department. Sass Aff. ¶ 6. Finally, Milazzo presents the resignation letter of her immediate successor, Christina Hernandez. The letter indicates Ms. Hernandez resigned from the position of Human Resources Administrator to seek a position with more authority and discretion.

In contrast to Milazzo's limited autonomy, Bruce Wisniewski, the current Human Resources Administrator, exercises broad discretionary authority in Milazzo's former position. Prior to his appointment as Human Resources Administrator, Wisniewski served as an Administrative Assistant in the Office of the Chief Judge and was responsible for labor relations and collective bargaining. As Human Resources Administrator, Wisniewski draws upon his prior experience and undertakes the responsibility for labor relations and collective bargaining for the Office of the Chief Judge. Wis. Aff. ¶ 15. Wisniewski serves as one of five members of

a management team responsible for assisting Judge O'Connell in running the operations of the Office of the Chief Judge. Wis. Aff. ¶ 3. Wisniewski advises Judge O'Connell and the senior management staff of six other Departments of the Circuit Court of Cook County regarding personnel, employment, and labor issues. Wis. Aff. ¶ 4.

Wisniewski implements current personnel policies, as well as recommends and develops new personnel policies. Wis. Aff. ¶ 5, 6. In doing so, Wisniewski investigates infractions of personnel rules, makes recommendations, and oversees the corrective action. Wis. Aff. ¶ 10. Wisniewski conducts interviews and makes recommendations for clerical and administrative positions, conducts screening interviews for law clerks, and coordinates the summer intern hiring program. Wis. Aff. ¶ 8, 11.

In addition, Wisniewski supervises the payroll, and monitors vacancies in payroll and payroll expenditures. More than simply preparing forms used in submitting budget requests, Wisniewski drafts those portions of the budget driven by changes in staffing. Wis. Aff. ¶ 12. Wisniewski assists the Department Heads of the six other Departments of the Circuit Court of Cook County in determining staffing needs as part of their budget preparation process. Wisniewski represents the Office of the Chief Judge in dealing with staff members of the President of the Cook County Board of Commissioners concerning fiscal and personnel issues, and with regard to other Departments of the Circuit Court of Cook County. Wis. Aff. ¶ 7, 13.

Furthermore, while neither party referred to it in arguing this motion, the Personnel Manual, which plaintiff assisted in

drafting, demonstrates the expansive nature of the Human Relations Administrator's position. The Manual makes the Human Resources Administrator an official step in the Office's grievance procedures, stating that if an employee is dissatisfied with her supervisor's handling of a grievance, the employee should notify the Human Resources Department for a response within ten work days. The Human Resources Department conducts all exit interviews, responds to all employee requests for transfers of assignments, has the right to review employee's medical releases and can require the employee to submit to an examination by the Employer's doctor. In addition, department supervisors are required to notify the Human Resources Department of an employee's break in service, to forward written reprimands to the Human Resources Department, and to forward requests for membership in professional organizations. The Manual directs employees to turn over any compensation for jury duty to the Human Resources Department, to apply to the Human Resources Department to receive credit for prior service, to inform the Human Resources Department of dual employment, and to direct all requests to examine their personnel file to the Human Resources Administrator in writing.

LEGAL ANALYSIS

We must determine whether defendants have enunciated a compelling reason to justify terminating Milazzo for her lack of political sponsorship. Two Supreme Court cases establish the guidelines to evaluate the legality of governmental employment decisions based upon political affiliations. Generally, a public employer may not terminate an employee for exercising her rights under the First Amendment. *Elrod v. Burns*, 427 U.S. 347, 360 (1976). However, political affiliation

may be an appropriate employment consideration for confidential and policymaking positions. *Branti v. Finkel*, 445 U.S. 507, 517-18 (1980). In *Elrod v. Burns*, the Supreme Court announced that a public employer's decision to terminate employees occupying policymaking or confidential positions was justified "to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration . . . ." *Elrod*, 445 U.S. at 518. The Supreme Court abandoned strict reliance upon the labels of policymaker and confidential employee in *Branti v. Finkel*, relying instead upon a more functional analysis. *Branti*, 445 U.S. 507. The relevant question under *Branti* is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the office involved. *Branti*, 445 U.S. at 518.

The Seventh Circuit further refined the *Branti* formula, stating that "the test is whether the position held by the individual authorizes either directly or indirectly meaningful input into government decisionmaking on issues where there is room for principled disagreement on goals or their implementation." *Nekolny v. Painter*, 653 F.2d 1164, 1170 (7th Cir. 1981). Such terminations are justifiable because "a public agency would be unmanageable if its head had to appoint or retain . . . members of the opposite party . . . in positions of confidence or positions in which they would be making policy or what amounts to the same thing, exercising discretion in the implementation of policy. He could not trust the occupants of the confidential positions to keep his secrets or the occupants of the policymaking positions to carry out his policies with fidelity and diligence." *Wilbur v. Mahan*, 3 F.3d 214, 217 (7th Cir. 1993).

For example, in *Bicanic v. McDermott*, the Seventh Circuit ruled that the plaintiff's former position of coordinator of the municipal park and recreation program was inherently political in nature. 867 F.2d 391, 393 (1989). As coordinator, plaintiff had been responsible for organizing and coordinating the park program, preparing the budget, interviewing candidates for employment and recommending who should be hired, and negotiating construction contracts. *Bicanic*, 867 F.2d at 393. The court held that the uncontested facts demonstrated that the position allowed for input into policymaking decisions. *Id*; *see also Tomczak v. City of Chicago*, 765 F.2d 633, 642 (1985) (responsibility for implementing policies, and planning and recommending budget requirements are indicative of a policymaking position).

The position need not be the final word in the decisionmaking process to constitute a policymaking position; it is sufficient that the position afforded input into such decisionmaking. *Warzon v. Drew*, 60 F.3d 1234, 1240 (7th Cir. 1995) (focusing upon input as opposed to final control). Furthermore, positions that do not carry policymaking responsibilities, but require political loyalty and confidentiality are similarly subject to patronage firings. *See Soderbeck v. Burnett County*, 752 F.2d 285, 288 (1985) (employer may require position of confidential secretary to be filled with political ally).

Initially, Milazzo contends that Wisniewski's testimony regarding the Human Resources Administrator's position is wholly conclusory. Without discussing the merit of this contention, we note that Wisniewski amended his affidavit to include specific examples of interviewing and hiring employees, suggesting and implementing personnel policies, recommending

the creation of new positions, participating in disciplinary investigations, and participating in budget requests by determining positions submitted for reclassification. See Wis. Amnd. Aff. We find that this evidence demonstrates that the position of Human Resource Administrator was a policymaking and confidential position. Wisniewski served as an advisor to Judge O'Connell, and brought pertinent information regarding personnel and budgetary needs to the table. He was responsible for a wide range of employment issues and handled the Office's labor relations and negotiations. Such a position clearly authorizes meaningful input into government decisionmaking on issues where there is room for principled disagreement on goals or their implementation.

Milazzo does not seriously contest that Wisniewski performs such tasks, nor does she challenge his authority to do so. Rather, she argues that the evidence demonstrates that neither she, her predecessor, nor her immediate successor performed the tasks or were granted the autonomy that Wisniewski is afforded in the position of Human Resources Administrator. Milazzo contends that such evidence defeats defendants' motion for summary judgment, because it raises a genuine issue of material fact as to the true nature of the position. We disagree, and find that the Seventh Circuit precedent dictates the opposite conclusion. *See, Tomczak v. City of Chicago*, 765 F.2d 633 (1984); *Hernandez v. O'Malley*, 98 F.3d 293 (1996).

In determining whether a position is susceptible to patronage dismissal, the Court must focus upon the nature of the position itself, not a particular employee's performance of the position. *Hernandez v. O'Malley*, 98 F.3d 293, 296 (7th Cir. 1996). Accordingly, a position may be considered

policymaking or confidential despite the fact that the previous officeholder performed fewer or less important functions than the current officeholder. *Tomczak v. City of Chicago*, 765 F.2d 633, 641 (7th Cir. 1985). Such a policy prevents one political party from appropriating "a sensitive office by appointing a routineer who (in W.S. Gilbert's language from H.M.S. Pinafore) 'never thought of thinking for himself at all.' Thus a new Water Commissioner may hire his own deputy, even if the incumbent is a witless paper pusher; **the office carries the potential for making discretionary political judgments**, and higher-ups may insist that the slot be filled with someone who will use those powers, and whose political credentials therefore matter." *Hernandez*, 98 F.3d at 296.

The Sixth Circuit recently applied this "potential power" rationale under circumstances similar to those presented by Milazzo, and held that a new judge executive was entitled to consider political affiliation in firing his purchasing agent and chief financial officer. *Blair v. Meade*, 76 F.3d 97 (6th Cir. 1996). The court held that "[t]he fact that the defeated judge executive had [one of the plaintiffs] perform ministerial rather than policymaking tasks does not change the conclusion that the inherent nature of his job made him particularly well-suited to aid in policymaking." *Id.* at 101. Therefore, the court ruled that the new judge executive was entitled to fill the plaintiffs' former positions with loyal employees capable of policymaking. This Court agrees with the Sixth Circuit and finds its holding to be consistent with Seventh Circuit law.

In the case at bar, both parties acknowledge that the Human Resources Administrator's office compiled extensive data regarding all aspects of personnel needs and employee histories. In fact, Milazzo admits that she interviewed candidates for

employment. This activity automatically leads to subjective judgments concerning a job candidate's overall presentation and ability. The Court's careful review of the undisputed evidence discloses that the Human Resources Administrator's position is particularly well suited to aid the Chief Judge in decisions regarding the expansion of staff, budget, personnel, labor relations, and hiring and firing. Thus, we cannot accept Milazzo's contention that Judge O'Connell is prohibited from filling the position of Human Resources Administrator with an individual qualified to engage in tasks not granted to Milazzo. Rather, we find that the office was always endowed with the "potential for making discretionary political judgments." *Hernandez*, 98 F.3d at 296; *see also Hudson v. Burke*, 913 F.2d 427 (7th Cir. 1990) (granting defendants' motion for summary judgment where city finance committee chairman utilized investigators to provide subjective input into policy decisions, even though previous finance chairman filled with positions with ministerial employees); *Kline v. Hughes*, 1997 WL 151312 (S.D. Ind., Mar. 5, 1997) (granting defendants' motion for summary judgment despite plaintiff's contention that both she and her predecessor performed purely ministerial tasks). Defendants' motion for summary judgment on Count II of plaintiffs' amended complaint is granted.

The undisputed facts establish that Ms. Milazzo's former Human Resources Administrator position has inherent policymaking potential. Therefore, this Court concludes that political affiliation is a reasonable requirement of the Human Resources Administrator position and that Chief Judge O'Connell did not violate Ms. Milazzo's First Amendment rights when he terminated her employment with the Circuit

Court of Cook County. Ms. Milazzo's job termination is unfortunate, but does not violate the Constitution.

Enter:

/s/ Ruben Castillo
Ruben Castillo
United States District Court Judge

DATED: October 21, 1997

APPENDIX C

In The
United States Court of Appeals
For the Seventh Circuit

No. 96-2332
ANNMARIE MILAZZO,

Plaintiff-Appellee,

v.

DONALD P. O'CONNELL, MARGARET KOSTOPULOS and DAWN CATUARA, individually and as employees of the Office of the Chief Judge of the Circuit Court of Cook County,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 95 C 5342-**Ruben Castillo, *Judge*.**

ARGUED JANUARY 13, 1997-DECIDED FEBRUARY 28, 1997

Before POSNER, *Chief Judge*, CUMMINGS and CUDAHY, *Circuit Judges*.

CUMMINGS, *Circuit Judge*. In September 1995 plaintiff Annmarie Milazzo filed a four-count complaint against Donald P. O'Connell, Chief Judge of the Circuit Court of Cook County, Illinois, and two members of his staff. The district court granted

defendants' motion to dismiss Counts I, III and IV but refused to dismiss Count II, resulting in this appeal by defendants.

Count II alleged that plaintiff's employment was terminated in violation of the First and Fourteenth Amendments because of her lack of political sponsorship. Plaintiff Annmarie Milazzo was Human Resources Administrator in the Office of the Chief Judge from 1990 to 1995. There were three defendants named to the complaint. Donald P. O'Connell is the Chief Judge of the Circuit Court of Cook County, Illinois. Margaret Kostopulos is Administrative Director or Acting Administrative Director of the Office of the Chief Judge of that court. Dawn Catuara is an administrative assistant to Chief Judge O'Connell.

On March 1, 1985, plaintiff was first employed by the Circuit Court of Cook County as secretary to the Executive Officer in the Office of the Chief Judge. In 1990 plaintiff became Administrator of the Personnel Department of the Circuit Court. In 1994 the Personnel Department was renamed the Human Resources Department. According to the complaint, plaintiff's duties were to implement the personnel policies adopted by the Chief Judge and his immediate staff.

On December 5, 1994, Judge O'Connell succeeded Judge Harry G. Comerford as Chief Judge of the Circuit Court. Later that month plaintiff had a meeting with Judge O'Connell to discuss the activities of plaintiff and her department. From December 1994 through March 1995 she had frequent contact with Judge O'Connell.

On January 30, 1995, defendant Catuara became administrative assistant to Judge O'Connell. Plaintiff's complaint alleges that for several months thereafter, defendant Catuara "relied heavily on plaintiff" but also gave her

contradictory instructions and criticized her for "taking actions that defendant Catuara had explicitly directed plaintiff to perform, but which resulted in problems."

The complaint alleges that in February 1995 Judge O'Connell directed defendant Catuara to eliminate testing and interviewing procedures for prospective employees "in order to hire new employees based upon their political sponsorship." Plaintiff's complaint also alleges that in June 1995 defendant Catuara criticized plaintiff because "defendant Catuara was embarrassed when she was unable to answer questions by Judge O'Connell about the political sponsorship of certain applicants for the summer job program, and falsely blamed her own inadequacies on plaintiff." In July 1995 defendant Catuara informed plaintiff that Judge O'Connell decided to transfer plaintiff to a lesser position, resulting in a $14,000 per year salary reduction.

On July 17, plaintiff's attorney contacted the Chief Judge's office about plaintiff's demotion or reassignment and was informed by defendant Kostopulos that there would be no reconsideration. The following day plaintiff met with defendant Kostopulos and told her she was accepting the position under protest. Later that day Kostopulos called plaintiff and said that Judge O'Connell wanted to know what "under protest" meant and whether she would accept the position "without reservations." Plaintiff said she would do so but the next day received a letter from defendant Kostopulos informing plaintiff that her position was terminated that same day, without an opportunity to be heard.

On September 19, 1995, plaintiff filed her four-count complaint, and in April 1996 Judge Castillo granted the

defendants' motion to dismiss Counts I, III and IV but denied the motion as to Count II and also denied the motion as to qualified immunity on Count II. According to that Count, the defendants' employment practices depended on the political sponsorship of an employee, and merit-testing procedures were abolished. Defendants supposedly based all personnel decisions predominantly on the basis of political sponsorship, and plaintiff was terminated because of her lack of such sponsorship. This practice allegedly violated plaintiff's rights under the First and Fourteenth Amendments "not to have her employment terminated due to her lack of political affiliation." In this Count plaintiff sought $1,000,000 in punitive damages, compensatory damages to be proven at trial, and her attorney's fees under 42 U.S.C. § 1988. In its opinion, the court pointed out that under *Elrod v. Burns*, 427 U.S. 347, 360, 363, a public employer's decision to terminate employees on the ground of political affiliation infringes their First Amendment rights, and the public employer must enunciate a compelling reason to justify the infringement. A compelling reason may be shown if the defendant is able to demonstrate that the dismissed employee occupied a policy-making or confidential position. See *Id.* at 367. The district court determined that it could not find as a matter of law from the pleadings that plaintiff's position was policy-making or confidential in nature. Therefore, the motion to dismiss Count II was denied so that defendants could make such a showing, thus justifying the dismissal. This Court reviews *de novo* the district court's denial of defendants' motion to dismiss on grounds of qualified immunity. See *Burns v. Reed*, 44 F.3d 524, 527 (7th Cir. 1995), certiorari denied, 115 S. Ct. 2583; *Kernats v. O'Sullivan*, 35 F.3d 1171, 1175 (7th Cir. 1994). We agree with the district court's analysis and therefore affirm.

Qualified immunity shields government officials who are performing discretionary functions from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818. Whether the defendants will be protected by qualified immunity "turns on the 'objective legal reasonableness' of the action, *Harlow*, 457 U.S., at 819, assessed in light of the legal rules that were 'clearly established' at the time it was taken, *id.*, at 838." *Anderson v. Creighton*, 483 U.S. 635, 639. As the Court stated in *Anderson*:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question had previously been held unlawful . . .; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Id. at 640 (citations omitted).

The basic contours of the law in this area are simple: Almost twenty-five years ago we first held that a nonpolicy-making or -confidential public employee may not be discharged for political allegiance. *Illinois State Employees Union v. Lewis*, 473 F.2d 561 (1972), certiorari denied, 410 U.S. 928. That principle was reaffirmed by the Supreme Court in *Branti v. Finkel*, 445 U.S. 507, and *Elrod v. Burns*, 427 U.S. 347, and more recently in *O'Hare Truck Service, Inc. v. City of Northlake*, 116 S. Ct. 2353, the Supreme Court extended that protection to independent contractors. As the Supreme Court stated in *Branti v. Finkel*: "[T]he ultimate inquiry is not whether

the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the [defendant] can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." 445 U.S. at 518. Similarly, this Court has stated that a patronage dismissal will not survive a First Amendment challenge unless the desired political affiliation is "essential to the discharge of the employee's governmental responsibilities." *Tomczak v. City of Chicago*, 765 F.2d 633, 640 (7th Cir. 1985), certiorari denied, 474 U.S. 946 (quoting *Branti*, 445 U.S. at 518); accord *Americanos v. Carter*, 74 F.3d 138, 140-141 (7th Cir. 1996), certiorari denied, 116 S. Ct. 1853.

Defendants bear the burden of establishing that plaintiff's position falls within the exception created in *Elrod* and *Branti* for certain policy-making or confidential positions. See *Elrod*, 427 U.S. at 368; *Matlock v. Barnes*, 932 F.2d 658, 663 (7th Cir. 1991), certiorari denied, 502 U.S. 909; *Nekolny v. Painter*, 653 F.2d 1164, 1169 (7th Cir. 1981), certiorari denied, 455 U.S. 1021. Defendants argue that plaintiff has pled particulars that show she has no claim, pointing to allegations in the pleadings that plaintiff's duties included implementing the Chief Judge's hiring policies, administering the summer job programs, providing the Chief Judge with information regarding job applicants, and working on budget and payroll issues. As a result, defendants argue that not only was the law not clearly established regarding plaintiff's protection from dismissal for political patronage purposes, but that plaintiff's job tasks show that, as a matter of law, plaintiff held a confidential or policy-making position and was therefore clearly subject to dismissal on those grounds.

Plaintiff responds that her complaint explicitly alleges that she had no "autonomous or discretionary authority," nor did she have hiring or firing authority, the ability to formulate personnel policy or an intimate working relationship with the Chief Judge. Plaintiff claims that she was supervised closely and was required to have her correspondence with others approved by the defendants. We find, as the district court did, that if we credit plaintiff's allegations, as we must (see *Anderson v. Holmes*, 16 F.3d 219, 221 n.3 (7th Cir. 1994)), it is not clear as a matter of law that plaintiff held a confidential or policy-making position or that party affiliation was an appropriate requirement for the effective performance of her duties.[1/] Therefore the district court's remand with respect to Count II of this complaint was well taken.[2/]

1/ The fact that plaintiff had some access to confidential information does not automatically make her a confidential employee within the meaning of *Elrod* and *Branti*. See *Meeks v. Grimes*, 779 F.2d 417, 420-421 (7th Cir. 1985). We agree with plaintiff's assertion that there is nothing in her complaint regarding her access to non-public information that makes political affiliation a necessary requirement for her position.

In addition, merely being a supervisor/administrator is not sufficient to show that political affiliation is an appropriate requirement for the job in question. See *Elrod v. Burns*, 427 U.S. at 367-368; *Flenner v. Sheahan*, No. 96-1979, slip op. at 7-8 (7th Cir. February 12, 1997); *Lohorn v. Michal*, 913 F.2d 327 (7th Cir. 1990) (Assistant Chief of Police). The cases cited by the defendants in their briefs and in oral argument before this court—*e.g.*, *Kaluczky v. City of White Plains*, 57 F.3d 202 (2d Cir. 1995); *Bicanic v. McDermott*, 867 F.2d 391 (7th Cir. 1989); *Shakman v. Democratic Organization of Cook County*, 722 F.2d 1307 (7th Cir. 1983), certiorari denied, 464 U.S. 916-are simply not analogous. Those cases cover positions that have hiring authority, involve the submission of budgets, and in many cases acknowledge policy-making authority.

2/ As this Court recently stated in *Flenner v. Sheahan*, slip. op. at 11:

> [O]n remand, the district court may be presented with evidence that the position of [plaintiff] involves more autonomy or discretion than is alleged in [plaintiff's] complaint. Once the factual record is developed, the district court

Judgment affirmed.

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may be required to revisit the qualified immunity issue.

Our holding here is simply that at this stage of the litigation and crediting plaintiff's allegations, we cannot say as a matter of law that party affiliation was an appropriate requirement for her position.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

ANNMARIE MILAZZO,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 95 C 5342
	)	
DONALD P. O'CONNELL, MARGARET KOSTOPULOS, and DAWN CATUARA,	)	Judge Castillo
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff Annmarie Milazzo brings this action pursuant to 42 U.S.C. § 1983 and state common law against defendants Donald P. O'Connell, the Chief Judge of the Circuit Court of Cook County, Illinois; Margaret Kostopulos, the Administrative Director of the Office of the Chief Judge; and Dawn Catuara, the Administrative Assistant to the Chief Judge.[1/] The suit stems from Milazzo's abrupt employment termination by the

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1/ The defendants are sued in both their official and individual capacities. As Milazzo recognizes, however, defendants are immune from suit in their official capacities. *See Scott v. O'Grady*, 975 F.2d 366, 369 (7th Cir. 1992), *cert. denied*, 508 U.S. 942 (1993) (monetary claims against a state are barred by the Eleventh Amendment, so state officials may not be sued for damages in federal court in their official capacities); *Orenic v. State Labor Relations Bd.*, 127 Ill. 2d 453, 476, 537 N.E.2d 784, 795 (1989) (employees of the Office of the Chief Judge are employees of the State of Illinois). Accordingly, the claims against the defendants in their official capacities are dismissed, and the remainder of this opinion will address the individual-capacity claims only.

defendants, and contains federal claims under the First and Fourteenth Amendments (Counts I-III), and a state law claim for retaliatory discharge (Count IV). The defendants have moved for dismissal of all counts pursuant to Federal Rule of Civil Procedure 12(b)(6).

RELEVANT FACTS[2/]

Milazzo began working for the Circuit Court of Cook County on March 1, 1985, first as a secretary to the Executive Officer in the Office of the Chief Judge ("Office"), and then as a caseworker in the Social Services Department of the court. In August 1989, she began serving as a court coordinator in the Personnel Department of the court. In 1990, she was named to the position of Administrator of the Personnel Department. Milazzo held this title (now Administrator of the Human Resources Department) until her termination in 1995.

Milazzo's duties were to implement the personnel policies adopted by the Chief Judge and his immediate staff. These duties included administering the summer job program for the Office, a task that involved receiving the applications and preparing summaries of them for the Chief Judge to use in deciding which applicants to hire. Another portion of her duties in administering the department involved working on the preparation of the budget for the Office, working with the Executive Officer on budget and payroll account issues generally, and participating in the initiation of a computer networking system linking the human resources sections of all the divisions of the court under the authority of the Office.

2/ These facts are drawn from the allegations in Milazzo's complaint, which we are bound to accept as true when considering a motion to dismiss. *See Doherty v. City of Chicago*, 75 F.3d 318, 322 (7th Cir. 1996).

Milazzo alleges that she was not accorded and did not exercise any autonomous or discretionary authority in the performance of these duties. As an example, the Chief Judge or his immediate staff were required to approve in advance any communication written by Milazzo that was intended to be sent to other employees.

Judge O'Connell became the Chief Judge of the Circuit Court on December 5, 1994. Over the course of the next eight months, Judge O'Connell had frequent contact with Milazzo in the performance of her duties. At no time did Judge O'Connell criticize her performance, although he allegedly sought to eliminate testing and interviewing procedures and replace them with political sponsorship requirements for employment, and in June 1995 Judge O'Connell and Catuara took over the receipt of the summer job applications from Milazzo, again allegedly in order to assure that applicants' political sponsorship was taken into account. Milazzo alleges that throughout this period she properly and satisfactorily administered the Human Resources Department.

On July 12, 1995, Catuara called Milazzo into her office and told Milazzo that Judge O'Connell had decided to transfer everyone in the Human Resources Department. Milazzo was to be transferred to the Social Service Department at the Criminal Courts Building as a PS2 caseworker, a classification that carried a salary $14,000 lower than Milazzo's then current salary.

Milazzo consulted with an attorney regarding this pending demotion and her legal options. The attorney contacted the Chief Judge's Office. On July 17, 1995, Kostopulos informed the attorney that the decision to transfer and demote Milazzo

would not be reconsidered. The following day, Milazzo met with Kostopulos and told Kostopulos that, upon the advice of her attorney, Milazzo was accepting the caseworker position "under protest." Milazzo was told to report to her new job two weeks from then. Milazzo returned home after the meeting, where she was telephoned by Kostopulos, who said Judge O'Connell wanted to know what "under protest" meant and whether Milazzo would accept the position "without reservations." Milazzo stated that while she was not happy about the cut in salary, she had always given 100% at her job and would continue to do so. The next day, Milazzo received a letter stating that her employment with the Circuit Court was terminated.

Milazzo's suit against Judge O'Connell, Catuara and Kostopulos contains four counts, the first three of which are brought pursuant to federal civil rights laws.[1] Count I alleges that Milazzo's firing violated procedural due process, because the Office's personnel policy manual and its custom and practice provided that discharges should be preceded by disclosure of the charges made, factual findings, and an opportunity for a hearing, yet Milazzo was terminated without any of these things. Count II alleges that Milazzo was fired based on her political affiliation, in violation of her rights under

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1/ One of the grounds upon which the defendants seek dismissal is that Milazzo fails to identify the federal statute under which she brings Counts I through III (presumably 42 U.S.C. § 1983). A complaint should not be dismissed if there is any set of facts that would support a claim entitling the plaintiff to relief; the complaint need not identify a legal theory, and even "specifying an incorrect theory is not fatal." *Bartholet v. Reishauer A.G. (Zurich)*, 953 F.2d 1073, 1078 (7th Cir. 1992). Milazzo has alleged facts which would meet the pleading requirements of § 1983, at least insofar as she had stated valid constitutional violations, as discussed below. Therefore, her complaint may not be dismissed for failure to mention § 1983.

the First Amendment. Count III claims that Milazzo was fired in retaliation for consulting an attorney, also in violation of her First Amendment rights. Count IV alleges the same retaliation for consulting with an attorney, but is brought on a state common law theory of retaliatory discharge. The defendants have moved to dismiss all counts for failure to state a claim.

LEGAL STANDARDS

A motion to dismiss tests the sufficiency of the complaint, not the merits of the suit. *Triad Ass'n, Inc. v. Chicago Housing Auth.*, 892 F.2d 583, 586 (7th Cir. 1989), *cert. denied*, 498 U.S. 845 (1990). When considering a motion to dismiss, the court views all facts alleged in the complaint, as well as any inferences reasonably drawn therefrom, in the light most favorable to the plaintiff. *Doherty v. City of Chicago*, 75 F.3d 318, 322 (7th Cir. 1996). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of her claim which would entitle her to relief. *Conley v. Gibson*, 355 U.S. 41, 45 (1957). In short, the only question is "whether relief is possible under any set of facts that could be established consistent with the allegations." *Bartholet v. Reishauer A.G. (Zurich)*, 953 F.2d 1073, 1078 (7th Cir. 1992) (citations omitted).

ANALYSIS

Count I: Procedural Due Process

"Procedural due process claims require a two-step analysis. The first step requires us to determine whether the plaintiff has been deprived of a protected interest; the second requires a determination of what process is due." *Doherty v. City of*

Chicago, 75 F.3d 318, 322 (7th Cir. 1996) (citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982)). At issue here is the first step: whether Milazzo had a protected property interest in her continued employment with the Circuit Court such that her abrupt termination required due process.

To establish that she had a protected property interest in continued employment, Milazzo must show that she had an entitlement to her job under Illinois law. *See Bishop v. Wood*, 426 U.S. 341, 344 (1976) ("the claim of entitlement must be decided by reference to state law"). In Illinois, there is a legal presumption that employment for an unspecified term is employment at will, a relation that is terminable by either party at any time for any reason. *See Duldulao v. St. Mary of Nazareth Hosp. Ctr.*, 115 Ill. 2d 482, 489, 505 N.E.2d 314, 317-18 (1987). Employment at will does not give rise to a property interest protected under the due process clause. *Campbell v. City of Champaign*, 940 F.2d 1111, 1112 (7th Cir. 1991) (citing *Simpkins v. Sandwich Community Hosp.*, 854 F.2d 215, 218 (7th Cir. 1988)). As Milazzo has not alleged that she was hired to her position for a fixed period of time, her employment is presumed to be at will and she cannot bring a due process claim for the loss of her job unless she has alleged some exception to the at-will rule.

Milazzo's first approach to the requirement of demonstrating a protectible property interest in her employment is to argue that some combination of the personnel policy manual promulgated by the Office of the Chief Judge, and the Office's alleged custom and practice of discharging employees only after notice and a hearing, together created "mutually explicit understandings" that gave rise to a protectible property interest in employment. *See* Complaint ¶¶ 25-27; *Duldulao*,

115 Ill. 2d at 490, 505 N.E.2d at 318 (policy manual may demonstrate an agreement that employees will be fired only for cause); *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (property interests "are defined by existing rules or understandings that secure certain benefits").

This argument is untenable for a variety of reasons, only one of which need be cited here: the express language of the manual that is the heart of the argument. The manual states, in bold print on every page, **"Employees of the Chief Judge are employed at the will of the Court. This personnel policy & procedure manual is not intended to alter the employment-at-will relationship."** Def.s' Mem. in Support of Motion to Dismiss, Ex. B.[4/] The very first sentence in the manual is, **"THE POLICIES ARTICULATED IN THIS MANUAL ARE NOT TO BE CONSTRUED AS A CONTRACTUAL STATEMENT.** *Id.* at 1-1. Thus, it is evident that the manual itself does not create contractual rights to permanent employment under *Duldulao*.

Further, the section of the manual covering the procedures to be implemented before discharging employees (section 8.5) is full of language negating any promise that such procedures will be applied to a specific case:

4/ In citing to the manual, we are not going beyond the bounds of the complaint, to which our analysis must be confined upon a motion to dismiss. *See* Fed. R. Civ. P. 12(b); *Thomason v. Nachtrieb*, 888 F.2d 1202, 1205 (7th Cir. 1989). Although Milazzo did not attach the manual to her complaint, she refers to it, *see* Complaint ¶¶ 25-27, and appears to rely on it in support of her procedural due process claim (Count I). "[D]ocuments attached to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to [her] claim." *Wright v. Associated Ins. Cos. Inc.*, 29 F.3d 1244, 1248 (7th Cir. 1994) (citing *Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir. 1993)).

> [D]ischarge **may** be given for an infraction serious in nature or when there has been previous corrective action. A recommendation for a suspension in excess of thirty (30) days or discharge **should** be documented on a Corrective Action Form by the immediate supervisor . . . . After reviewing all relevant documentation, the Executive Officer/Designee **should** hold a conference with the employee, immediate supervisor, and any other persons deemed necessary.

Id. at 8-2 (emphasis added). The language is exhortatory, not mandatory. The manual's promises (if indeed they are such) that formal disciplinary procedures will precede discharge are further weakened by section 8.7, which states: "In most cases, the aforementioned steps will be followed. However, any departure from these steps will not invalidate any corrective action." *Id.* at 8-3. Thus, even taking as true Milazzo's allegation that it was the usual custom of the Office not to discharge employees without notice of the charges and an opportunity to be heard (among other procedures), the manual informed Milazzo that those procedures might not be applied in every case, and thus that she had no right to those procedures.

If, as this language states, the employer could choose to disregard the formal discharge procedures without consequences, then the manual's "promise" of notice and a hearing before discharge is illusory, and cannot establish any property rights to for-cause discharge or permanent employment. "When the policy manual can vanish with a wave of the administrator's wand, or when the administrator is free to disregard his own words, the [plaintiff] has nothing of substance and therefore neither liberty nor property." *Miller v. Henman*, 804 F.2d 421, 425 (7th Cir. 1986), *cert. denied*, 484

U.S. 844 (1987). In the face of these express disclaimers, it is clear that the manual—even in conjunction with the Office's alleged customary practice of providing pre-discharge notice and a hearing—did not give Milazzo "the sort of secure and dependable interest fairly describable as an entitlement" to her job. *Campbell v. City of Champaign*, 940 F.2d at 1112 (plaintiff who served "at the pleasure of the City Manager" did not have a protectible property interest in her job).

Perhaps recognizing the weakness of her first argument, Milazzo attempts to pursue another way out of the at-will quicksand. In her response brief to the defendants' motion to dismiss, she submits "the following facts that are as yet hypothetical, but consistent with the explicit allegations in the complaint": in December 1994, shortly after Judge O'Connell's ascension to Chief Judge, Milazzo met with him to seek assurance about her job future, and Judge O'Connell orally promised her that she could stay on in her current position at the same salary, so long as she performed at the level she had in the past. Milazzo contends that this promise was in essence a promise to terminate her only for good cause, and that it changed the terms of her employment from at-will to permanent.[5/] Milazzo asserts that this oral promise is enforceable under the theories of implied contract and/or

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5/ "Permanent employment," as that phrase is used in Illinois law, is not limited to offers for lifetime employment. It also includes other employment for an indefinite term that is not at-will, such as employment in which termination is for just cause only or in which the employee may work as long as she wishes or as long as she performs the job. *See, e.g., Martin v. Federal Life Ins. Co. (Mut.)*, 268 Ill. App.3d 698, 644 N.E.2d 42 (1st Dist. 1994) (using "permanent employment" in discussing offer that employee "could have a job as long as he wanted"); *Wilder v. Butler Mfg. Co.*, 178 Ill. App. 3d 819, 533 N.E.2d 1129 (3d Dist. 1989) (describing a claim that employer promised employee that she would have a job "as long as [she] produced" as a claim of permanent employment).

promissory estoppel; the implication is that a promise to terminate only for cause that is definite enough to be legally enforceable under state law gives rise to a property interest in her employment that would be protectible under the Fourteenth Amendment.

As a threshold matter, the defendants protest that Milazzo should not be permitted to assert new facts to bolster her complaint in her response to their motion to dismiss, citing among other cases *Thomason v. Nachtrieb*, 888 F.2d 1202, 1205 (7th Cir. 1989) ("It is a basic principle that the complaint may not be amended by the briefs in opposition to a motion to dismiss"), and *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984) (same), *cert. denied*, 470 U.S. 1054 (1985). While much precedent supports this argument, our appellate court has also taken a somewhat different stance in several cases, including some recent decisions. *See, e.g., Highsmith v. Chrysler Credit Corp.*, 18 F.3d 434, 439 (7th Cir. 1994) ("This court has held that when reviewing Rule 12(b)(6) motions, we will consider new factual allegations raised for the first time on appeal provided that they are consistent with the complaint'); *Hrubec v. National R.R. Passenger Corp.*, 981 F.2d 962, 963-64 (7th Cir. 1992) ("A plaintiff need not put all of the essential facts in the complaint. He may add them by affidavit or brief—even a brief on appeal."); *Early v. Bankers Life & Cas. Co.*, 959 F.2d 75, 59 (7th Cir. 1992) (a party may defend against a motion to dismiss by alleging facts in its brief in opposition to the motion).

These diametrical approaches are difficult to reconcile, but a careful reading indicates that the key distinguishing factor may be whether the plaintiff's response brief alleges new *facts* (which is permissible if they are consistent with the complaint)

or whole new *claims* (which may be impermissible). *See Dausch v. Rykse*, 52 F.2d 1425, 1428 n.3 (7th Cir. 1994) ("The facts asserted in the memorandum in opposition to the motion to dismiss, but not contained in the complaint, are relevant to the extent that they 'could be proved consistent with the allegations.'").

Here, the relevant claim is Milazzo's claim of procedural due process violation. That claim remains the same. What has changed is the facts and legal theories supporting one element of this claim, the element of a protectible property interest in here employment. Milazzo appeared to allege in her complaint that the property interest arose out of the policy manual, whereas now she argues that it could also have arisen from an oral promise made by Judge O'Connell.

We find the words of Judge Easterbrook in *Bartholet v. Reishauer A.G. (Zurich)*, 953 F.2d 1073, 1078 (7th Cir. 1992), instructive here: "A complaint under Rule 8 limns the claim; details of both fact and law come later, in other documents." We believe this approach harmonizes best with the spirit of the Federal Rules of Civil Procedure. Milazzo's complaint adequately describes her procedural due process claim, and she is not forbidden from alleging new facts, or even new legal theories about that claim, in her response brief.

Unfortunately for Milazzo, however, the premise of her newly asserted theory fails. The oral promise that she now says Judge O'Connell made cannot support a claim of either implied contract or promissory estoppel under Illinois law, and so does not give rise to a property interest protected by the Due Process Clause.

In Illinois oral contracts for employment are viewed more skeptically than written contracts, *Smith v. Board of Education*, 708 F.2d 258, 263 (7th Cir. 1983), and the analysis of such contracts is "more scrutinizing." *Maher v. Con-Way Intermodal, Inc.*, No. 92 C 2863, 1993 WL 243319 at *6 (N.D. Ill. June 30, 1993). "In order for an employee to show that [her] employer made a binding oral contract for permanent employment, the employee is required to prove that the employer made clear and definite oral promises as to the terms and duration of the employment, and that there was sufficient consideration for the promise." *Id.* (citing *Eastman v. Chicago, Cent. & Pac. R.R. Co.*, 930 F.2d 1173, 1177 (7th Cir. 1991)). The promise as described by Milazzo may fail the first requirement, that it contain clear and definite terms. We do not reach this issue here, however, as the claim fails on other grounds: the second element, adequate consideration, is missing.

The Seventh Circuit has noted that "Illinois courts will enforce an oral promise to employ a person for life or some other equally indefinite length of time only if the employee makes in return some sacrifice . . . that he probably would not have made absent a guarantee of continued permanent employment." *Smith v. Board of Educ.*, 708 F.2d at 263. This "sacrifice" provides the consideration for the employer's promise. Generally, the mere agreement to continue working in the present job at the present level of effort has not been held to be sufficient consideration for such a promise. *See id.* ("Under Illinois law an oral promise of permanent employment given in exchange for a promise to work is unenforceable") (citing *Heuvelman v. Triplett Electrical Instr. Co.*, 23 Ill. App. 3d 231, 235, 161 N.E.2d 875, 877 (1st Dist. 1959)); *Lamaster*

v. Chicago & N.E. Ill. Dist. Council of Carpenters Apprentice & Trainee Program, 766 F. Supp. 1497, 1501 (N.D. Ill. 1991) ("a mere promise to perform the services of employment alone cannot support a contract for permanent employment"). Nor is "merely waiving the right to pursue or accept alternative employment opportunities" adequate consideration. *Lamaster*, 766 F.Supp. at 1502. Only if (1) the employee forgoes a real and favorable job offer from another employer or gives up a secure position elsewhere, and (2) that sacrifice is expressly made in return for the promise of permanent employment (*i.e.*, "specially bargained for"), will courts enforce an oral promise of permanent employment. *Id.* at 1501-03.

Here, the facts "hypothesized" by Milazzo in her response brief state only that she was promised continued employment at her existing salary in exchange for "performing her job at the level she had performed at in the past." Pl.'s Resp. Br. at 6. She does not claim to have given up any concrete offers of employment elsewhere, or allege any return promise on her part for any other type of additional consideration. As noted earlier, a promise to continue working at the same level is not sufficient consideration to support an oral promise of permanent employment under Illinois law. Thus, Milazzo's theory that the oral promise created an implied contract must fail.

This theory also fails because of the Statute of Frauds, 740 ILCS § 80/1 (1995). The Statute requires a writing memorializing any contract that is not capable of being performed within one year; if there is no such writing, then the contract is not legally binding. *See Sinclair v. Sullivan Chevrolet Co.*, 45 Ill. App.2d 10, 14, 195 N.E.2d 250, 252 (3d Dist.), *aff'd*, 31 Ill. 2d 507, 202 N.E.2d 516 (1964). Illinois cases evidence some disagreement over how the Statute applies

to contracts for permanent employment. Some cases hold that an oral contract in which the employment may be terminated upon the occurrence of a contingency (such as the employee failing to perform her duties or wishing to leave) is capable of performance within a year and thus is not barred by the Statute. *See, e.g., Vajda v. Arthur Andersen & Co.*, 253 Ill. App. 3d 345, 357, 624 N.E.2d 1343, 1351 (1st Dist. 1993). Others hold that the applicability of the Statute depends on the nature of the contingency, and whether the occurrence of the contingency would frustrate performance of the contract or complete the contract. *See, e.g., Lamaster*, 766 F. Supp. at 1506-09; *Cohn v. Checker Motors Corp.*, 233 Ill. App.3d 839, 844, 599 N.E.2d 1112, 1116 (1st Dist. 1992). For instance, with a promise to employ someone for as long as he wanted, the full term contemplated by the parties has been completed once the contingency occurs (the employee wishes to leave or retire). Thus, the promise is capable of performance within one year and is not within the Statute. *See Lamaster*, 766 F.Supp. at 1508-09. By contrast, with a promise to employ someone as long as he meets the job requirements, the occurrence of the contingency (the employee's failure to meet the requirements) frustrates and cuts off the continuing performance of the contract. Thus, even if the contingency occurs within one year, the contract has not been *performed*, i.e. completed, within the year, and so the Statute applies to bar such contracts unless they are memorialized in writing. *Cohn*, 233 Ill. App. 3d at 844, 599 N.E.2d at 1116.[6/]

6/ This distinction has been applied outside the employment context as well. *See Electronic Replacement Svs. Inc. v. ITT Hartford Ins. Co.*, No. 95 C 1469, 1995 WL 560913 at *3 (N.D. Ill. Sept. 18, 1995) (a requirements contract in which the defendant promised to buy goods from the plaintiff unless the defendant had a "valid

Although there is no sign that this split has been resolved by the Illinois courts, the Seventh Circuit appears to have adopted the latter approach. *See Taylor v. Canteen Corp.*, 69 F.3d 773, 785 (7th Cir. 1995) ("We are persuaded . . . by Judge Moran's thoughtful analysis in *Lamaster*"). It is somewhat unclear why the difference between an employer's promise to extend employment as long as the employee wishes, and a promise to extend employment only so long as the employee performs competently, should require the latter but not the former to be evidenced by a writing. There is no doubt, however, that we must follow our appellate court. Milazzo's implied oral contract theory fails because of the Statute of Frauds as well as for lack of adequate consideration.

Milazzo next argues that the promise allegedly made by Judge O'Connell is enforceable under a promissory estoppel theory. A claim of promissory estoppel has four elements under Illinois law: (1) an unambiguous promise; (2) reliance on the promise; (3) the reliance was expected and foreseeable; and (4) the reliance caused the promisee some detriment or injury. *See Quake Constr., Inc. v. American Airlines, Inc.*, 141 Ill. 2d 281, 309-10, 565 N.E.2d 990, 1004 (1990). The defendants contend that Milazzo's promissory estoppel argument is defective on several of these points, including that the promise was not unambiguous, that Milazzo's reliance was not reasonable or foreseeable, and that her reliance did not cause her any detriment. We bypass these contentions because the promissory estoppel argument is defective for another reason: as with the

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and legitimate reason or basis to stop" was unenforceable under the Statute of Frauds because the occurrence of the contingency would frustrate and cut off performance of the contract rather than completing it; citing *Lamaster* and *Cohn*, among other cases).

oral contract theory, the Statute of Frauds bars Judge O'Connell's oral promise from being enforceable under a promissory estoppel theory. *See First Nat'l Bank v. McBride Chevrolet, Inc.*, 267 Ill. App. 3d 367, 373, 642 N.E.2d 138, 142 (4th Dist. 1994) ("Promissory estoppel is not an exception to the Statute of Frauds.").

Milazzo has not alleged any viable source of a property interest that would be protected by the Fourteenth Amendment, either from the Office's policy manual and its customs and practices, or from the oral promise which Milazzo now alleges Judge O'Connell made to her. Accordingly, Milazzo cannot make out a procedural due process claim for the deprivation of her job, and we dismiss Count I of the complaint.

Count II: First Amendment/Patronage Hiring

Milazzo alleges in the second count of her complaint that she was terminated because of her political affiliation and because she lacked a political sponsor, and that this violated her First Amendment rights of association. In *Elrod v. Burns*, 427 U.S. 347, 360 (1976), the Supreme Court held that a public employer's decision to terminate employees on the grounds of political affiliation unquestionably infringes employees' First Amendment rights.[7/] Therefore, the public employer must enunciate a compelling interest that would justify the infringement. *Id.* at 363 ("to survive constitutional challenge,

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7/ This may be so even though an employee has no protected property interest in her job for due process purposes. *See Elrod*, 427 U.S. at 360-61 ("even though a person has no 'right' to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely") (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)).

[the political affiliation requirement] must further some vital governmental end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights"). When the dismissed employee occupied a policy-making position, the need for political loyalty to prevent the undercutting of the new administration's policies can be such a "vital governmental end." *Id.* at 367. Accordingly, the inquiry becomes whether the dismissed employee occupied a policy-making or confidential position or, as it was phrased in *Branti v. Finkel*, 445 U.S. 507, 518 (1980), "whether the hiring authority can demonstrate that party [or other political] affiliation is an appropriate requirement for the effective performance of the public office involved."

The defendants bear the burden of establishing that Milazzo's position falls within the exception created in *Elrod* and *Branti*. *Nekolny v. Painter*, 653 F.2d 1164, 1169 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982) (citing *Elrod*, 427 U.S. at 368). This burden is difficult for a defendant employer to carry in the context of a motion to dismiss, in which the court must take its cue from the plaintiff's allegations. Nevertheless, it is possible that a plaintiff may plead particulars that show she has no claim. In that case, she has pleaded herself out of court. *Thomas v. Farley*, 31 F.3d 557, 558-59 (7th Cir. 1994).

The defendants claim that is the case here. They urge that it is clear from the face of the pleadings[8] that Milazzo's duties

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[8] In addition to arguing from the complaint itself, both parties have attempted to bring documents that are outside the scope of the complaint to our attention, *viz.*, lists of "key" employees in the Chief Judge's Office on which Milazzo's name either does or does not appear. "Courts are restricted to an analysis of the complaint when evaluating a motion to dismiss," *Hill v. Trustees of Indiana Univ.*, 537 F.2d 248, 251

as Director of Human Resources included input into the policy-making process and the implementation of such policy as it affected hiring decisions. Defendants point to allegations that Milazzo's duties included implementing the Chief Judge's hiring policies, providing the Chief Judge with information, and working with the Executive Officer on budget and payroll issues. Compl. ¶¶ 10, 13, 18. Defendants argue that these tasks indicate that, as a matter of law, Milazzo held a confidential or policy-making position.

Milazzo counters by pointing out that her complaint explicitly alleges that she "was not accorded nor did she exercise in the performance of her duties autonomous or discretionary authority," *id.* ¶ 10, and that the defendants supervised her closely and were required to approve her contacts with others. *See id.* ¶¶ 10-18. We find that, taken all together, the allegations of her complaint fairly present a picture of an employee whose actual work was largely and perhaps wholly ministerial, who may have personally disagreed with her new employer's policies regarding the importance of political sponsorship in hiring decisions but who obediently carried out those policies.[2/]

The defendants correctly note that, in evaluating the nature of Milazzo's position, we must look to the responsibilities of the position itself, not to the specific duties that Milazzo may have

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(7th Cir. 1976), and neither party has asked us to convert this motion into one for summary judgment. Thus, we have not considered the extra material in deciding the motion before us.

2/ We accept this characterization of the facts for purposes of this motion, of course, but express no opinion on whether it will ultimately be supported by the evidence.

actually exercised in that position. *See Tomczak v. City of Chicago*, 765 F.2d 633, 640 (7th Cir.), *cert. denied*, 474 U.S. 946 (1985) ("*Elrod* and *Branti* require examination of the powers inherent in a given office, as opposed to the functions performed by a particular occupant of that office"). This statement only highlights the difficulty of making a determination about whether a particular position should be characterized as policy-making or confidential in the context of a motion to dismiss, however, for the only data we have about the general powers inherent in the office of Director of Human Resources are the allegations of the complaint, which focus on the work performed by Milazzo rather than the general duties of her position.

The Seventh Circuit has recognized that the applicability of the policy-making exception is a difficult issue to resolve on a motion to dismiss. *See Nekolny v. Painter*, 653 F.2d at 1169-70 (reversing a district court's finding that as a matter of law a position was policy-making, and stating that whether political loyalty is a legitimate requirement for a given position is a factual question or a "matter of proof"); *Meeks v. Grimes*, 779 F.2d 417, 419 (7th Cir. 1985) (noting the difficulty of assessing the functional attributes of a position because "not only do job classifications and personalities vary in each case, but also there are substantial differences between governmental bodies and between individual departments or units within a given governmental body"); *Soderbeck v. Burnett County*, 752 F.2d 285, 288-89 (7th Cir.) (refusing to hold that the issue of whether a position is policy-making or confidential is a matter of law), *cert. denied*, 471 U.S. 1117 (1985). Indeed, because this inquiry is a factual one, it may be difficult to resolve even on a motion for summary judgment, unless the evidence presented

is so one-sided that no reasonable jury could find in favor of the plaintiff.

Crediting Milazzo's allegations, as we must at this stage of the case, we cannot say that it is clear as a matter of law that her position was policy-making or confidential in nature. The title of her former position is suggestive of policy-making power, but the title alone cannot be dispositive: the *Elrod/Branti* line of cases "is concerned with function, not label." *Gannon v. Daley*, 561 F. Supp. 1377, 1385 n.22 (N.D. Ill. 1983). Accordingly, the resolution of this issue must await the development of the evidence, and we deny the defendants' motion to dismiss Count II.

Count III: First Amendment/Retaliatory Discharge

In Count III, Milazzo alleges that the defendants terminated her in retaliation for her consultation with and retention of an attorney to defend her rights as an employee, and that the termination infringed her First Amendment rights of "association to consult with an attorney." Compl. ¶¶ 44-45. Both parties have had difficulty in identifying the law applicable to such a claim. In their motion to dismiss, the defendants suggested that the claim was a variant of the common situation in which an employee alleges that he or she was fired for speaking out on an issue, governed by cases such as *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), *Connick v. Myers*, 461 U.S. 138 (1983), and *Griffin v. Thomas*, 929 F.2d 1210 (7th Cir. 1991). In her response, Milazzo denied this characterization of her claim and instead described it as a claim of denial of access to counsel and the courts, citing *Vasquez v. Hernandez*, 60 F.3d 325 (7th Cir. 1995), *cert. denied*, ___ U.S. ___, 64 U.S.L.W. 3593 (1996), *Rizzo v. Dawson*, 778 F.2d 527 (9th Cir. 1985),

and *Owens v. Rush*, 654 F.2d 1370 (10th Cir. 1981).[10] A claim such as that raised in *Vasquez* would not work here because Milazzo's access to counsel and the courts has not, in fact, been obstructed as it was in *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984), the case on which *Vasquez* was based. In *Bell*, the police conspired to successfully cover up the wrongful shooting of the plaintiff's decedent for over twenty years, thus preventing his estate from bringing an action in court. The Seventh Circuit held that "[t]he Fourteenth Amendment entitles an individual to a fair opportunity to present his or her claim." *Id.* at 1261. By contrast, in *Vasquez* the Seventh Circuit held that this Fourteenth Amendment right to "a fair opportunity to present a claim" had not been infringed where the police coverup at issue was unsuccessful and only delayed the plaintiff's lawsuit by six months without prejudicing her ability to recover in any manner. *Vasquez*, 60 F.3d at 329. Here, where Milazzo can point to no actual obstruction of her access to the courts, she cannot recover on such a theory.

It appears to us that the line of cases most relevant to the substance of Milazzo's claim is a slightly different one, the line of cases begun in this circuit with *Altman v. Hurst*, 734 F.2d 1240 (7th Cir.), *cert. denied*, 469 U.S. 982 (1984), and continued in *Yatvin v. Madison Metro. Sch. Dist.*, 840 F.2d 412 (7th Cir. 1988), *Auriemma v. Rice*, 910 F.2d 1449 (7th Cir. 1990) (en banc), *cert. denied*, 501 U.S. 1204 (1991), *Marshall v. Allen*, 984 F.2d 787 (7th Cir. 1993), and *Zorzi v. County of Putnam*, 30 F.3d 885 (7th Cir. 1994). These cases all concern

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[10] Milazzo also cited to *Rager v. Boise Cascade Corp.*, No. 88 C 1436, 1989 WL 31469 (N.D. Ill. March 23, 1989), but that case concerned a state law claim for retaliatory discharge, not a federal civil rights claim.

complaints by public employees that they had been retaliated against by their employers for participating in the filing of a lawsuit against the employer, either by themselves or fellow employees. The cases hold that retaliation against a government employee for filing a lawsuit may be prohibited—by the First Amendment's protection of the rights of free speech and to petition for the redress of grievances, not by a separate right of access to the courts. *Zorzi*, 30 F.3d at 896.

The situation presented in the *Altman* line of cases is not identical to that in *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983): in *Pickering* and *Connick* the retaliation was for the employee's speech against the employer, whereas in *Altman*-type cases (as here) it is for the employee's participation in the filing of litigation against the employer. Nevertheless, the Seventh Circuit has imposed the requirement that, in order to recover in *Altman*-type cases, a plaintiff employee must show that the lawsuit that triggered the adverse employment action concerned a matter of public interest, not merely the personal grievances of the employee—a "public concern" requirement that is drawn directly from *Pickering* and *Connick*. That is because *Altman* and its progeny take guidance from *NAACP v. Button*, 371 U.S. 415 (1963), and related Supreme Court cases which hold that association in order to seek judicial redress of grievances is a form political expression. *See, e.g.*, *Button*, 371 U.S. at 429 ("In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means of achieving the lawful objectives of equality of treatment by all government . . . for the members of the Negro community in this country. It is thus a form of political expression.") (quoted in *Altman*, 734 F.2d at 1244 n.10). Because the *Pickering/Connick* test governs

actions for retaliation for an employee's speech, and because the kind of association in furtherance of litigation protected by the First Amendment is a type of expression or speech, the Seventh Circuit applies the *Pickering/Connick* requirements to claims of retaliation for involvement in a lawsuit.

The *Pickering/Connick* standard requires that the employee's speech be about a matter of public concern to be protected by the First Amendment. Likewise, before an employee can claim that the First Amendment prohibited his or her firing for associating with counsel in order to pursue a lawsuit, the employee must show that the subject of the lawsuit was a matter of public concern. *Zorzi*, 30 F.3d at 896 ("If a public employee is retaliated against for filing a lawsuit, the public employee has no First Amendment claim unless the lawsuit involves a matter of public concern.").

The allegations of Milazzo's complaint fail in this regard. She alleges that she "consulted with an attorney about her pending demotion and her available legal recourse." Compl. ¶ 21. This allegation clearly establishes that Milazzo's reason for going to the attorney was "to advance her career, not promote a cause." *Yatvin v. Madison Metro. Sch. Dist.*, 840 F.2d at 419. Although Milazzo also alleges that the defendants intended to deter "other similarly situated employees from consulting with counsel" by firing her, Compl. ¶ 44, there are no allegations that would indicate that any "similarly situated employees" were in a position to sue on a matter of public concern, either. Nor does Milazzo allege that she and other employees had been associating, either with attorneys or each other, for the purpose of bringing the political sponsorship policies of Judge O'Connell to public attention.

In short, there is no basis in the complaint from which to infer that Milazzo's consultation with an attorney involved any public concerns. Accordingly, we dismiss Count III of the complaint.

Count IV: State Law Claim for Retaliatory Discharge

Milazzo's last claim is a state law claim for retaliatory discharge under Illinois law. A plaintiff may have a tort cause of action for retaliatory discharge under Illinois law if the employer has discharged the employee in retaliation for the employee's activities, and the discharge was "in contravention of a clearly mandated public policy." *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 134, 421 N.E.2d 876, 881 (1981). The difficulty, of course, lies in determining whether the discharge violated a clearly mandated public policy.

Although a public policy that will support a claim for retaliatory discharge has been broadly defined as those matters that "strike at the heart of a citizen's social rights, duties, and responsibilities," *id.*, 85 Ill. 2d at 130, 421 N.E.2d at 878-79, in practice recent Illinois cases have limited the retaliatory discharge cause of action to two situations, retaliation for filing a worker's compensation claim and retaliation for reporting illegal conduct. *See Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978) (establishing workers' compensation exception); *Palmateer*, 85 Ill. 2d 124, 421 N.E.2d 876 (establishing criminal investigation/whistle-blowing exception).[11/] "When asked to further expand the scope of the

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11/ We note that *Palmateer* listed cases in which other public policy exceptions to the at-will rule had been recognized, including refusing to violate statute, refusing to evade jury duty, and engaging in statutorily protected union activities. *Id.*, 85 Ill. 2d at 130-31, 421 N.E.2d at 879. Presumably, these public policy exceptions are

tort action beyond Workers' Compensation and "whistle-blower" related discharges, however, our supreme court has drawn the line and denied plaintiff's retaliatory discharge causes of action. Likewise, our appellate court has refused to countenance an expansion of the tort by denying claims of retaliatory discharge brought on grounds outside of those approved in *Kelsay* and *Palmateer*." *Mitchell v. Deal*, 241 Ill. App. 3d 331, 333-34, 609 N.E.2d 378, 379 (3d Dist. 1993) (collecting cases) (citations omitted).

When we decide claims brought under state law pursuant to our supplemental jurisdiction, 28 U.S.C. § 1367, we apply state law to those claims. *See Erie R.R. Co. v. Tompkins*, 340 U.S. 64, 78 (1938). Thus, even if we agreed completely with Milazzo's argument that a public policy exception to the at-will rule should be recognized protecting employees who consult attorneys over legitimate grievances, we are bound to honor the determination of Illinois courts to limit such exceptions to those already identified in *Kelsay* and *Palmateer*.

Moreover, Illinois courts have found that the right of access to the courts to pursue grievances, contained in the United States and Illinois constitutions, does not support a public policy exception protecting an employee's right to confer with a lawyer regarding private disputes with the employer. *See Paris v. Cherry Payment Sys., Inc.*, 265 Ill. App. 3d 383, 385, 638 N.E.2d 351, 353-54 (1st Dist. 1994); *Abrams v. Echlin Corp.*, 174 Ill. App. 3d 434, 440-42, 528 N.E.2d 433-35 (1st Dist. 1988). Both of these cases cite with approval *Kavanagh v. KLM Royal Dutch Airlines*, 566 F. Supp. 242, 244 (N.D. Ill. 1983),

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still valid, despite the common failure to recent cases to mention them. The allegations of Milazzo's complaint do not implicate any of these situations.

in which Judge Leighton found that a public policy exception protecting employees who consult attorneys should not be recognized, because doing so would to greatly refashion the balance of power that currently exists in Illinois' law of employment at will. Without commenting on the merit of that balance of power, we generally agree with this statement. We further find that there are no legal principles that would support the notion that a purely private employment dispute suddenly becomes a matter of "public policy" merely because the employee has retained counsel. For all of these reasons, we grant the defendants' motion to dismiss Count IV of Milazzo's complaint.

Qualified Immunity

The final argument to be addressed is the defendants' contention that they are entitled to qualified immunity from suit. Government officials sued in their individual capacities are entitled to qualified immunity "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). When faced with a motion that includes arguments on both the substance of the plaintiff's claims and qualified immunity, a court should first address those arguments directed to substance. *See Siegert v. Gilley*, 500 U.S. 226, 232 (1991) (initial inquiry in qualified immunity determinations is "whether the plaintiff has asserted a violation of a constitutional right at all"). Once the court has determined that a viable constitutional claim has been made, it examines the applicability of qualified immunity on that claim. *Id.*

We have conducted this threshold inquiry, *see supra*, and have determined that only one of the four claims states a violation of a constitutional right. Milazzo's claim that she was fired because of her political affiliations in violation of her First Amendment rights (Count II) must be allowed to proceed further, as it is unclear from the allegations of the complaint whether or not she held a confidential or policy-making position. That same dearth of the facts necessary to determine the ultimate viability of Count II also precludes us from holding that the defendants have qualified immunity on this claim. At this point, we simply do not have sufficient information to conclude that any reasonable government official would have believed that Milazzo held a position for which political loyalty was required. *See Kolman v. Sheahan*, 31 F.3d 429, 434 (7th Cir. 1994) ("even a qualified immunity inquiry cannot take place until the facts about [the plaintiff's position] and the plaintiff['s] roles . . . are put on the table"). Accordingly, we deny the defendants' request for a finding of qualified immunity at this time.

CONCLUSION

For the foregoing reasons, we grant the defendants' motion to dismiss as to Counts I, III and IV of the plaintiff's complaint, and deny the motion as to Count II. A status hearing in this case is set for May 10, 1996 at 9:30 a.m.

ENTER:

/s/ Ruben Castillo
Ruben Castillo
United States District Judge

April 26, 1996

APPENDIX E

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

August 31, 1998

Before

Hon. RICHARD A. POSNER, Chief Judge

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. RICHARD D. CUDAHY, Circuit Judge

ANNMARIE MILAZZO, *Plaintiff-Appellant*, No. 97-4217 vs. DONALD P. O'CONNELL, MARGARET KOSTOPULOS and DAWN CATUARA, individually and as employees of the Office of the Chief Judge of the Circuit Court of Cook County, *Defendants-Appellees.*	]]]]]]]]]]]]]	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 95 C 5342 **Ruben Castillo**, *Judge*

ORDER

On consideration of the petition for rehearing with suggestion for hearing en banc filed by defendants-appellees on August 11, 1998, and the answer filed by plaintiff-appellant, all

of the judges on the panel voted to deny rehearing and no judge in active service requested a vote on the suggestion for rehearing en banc. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

On further consideration of the petition for rehearing, the original opinion issued on July 29, 1998, is modified by the addition of the following at the end of line 8 on page 8:

Plaintiff has identified to this Court several respects in which (she claims) defendants have done just that. She says she can prove that defendants suddenly gave the position far broader policy powers than it had possessed during her own tenure and those of her predecessor and immediate successor.

It is true that the mere fact that the incumbent in a position was not entrusted with policy-making authority does not preclude inquiry into whether the position itself has "the potential for making discretionary political judgments." *Hernandez v. O'Malley*, 98 F.3d 293, 296 (7th Cir. 1996). But by producing evidence suggesting that defendants changed the position's responsibilities, plaintiff has taken her case beyond the ambit of this principle. If plaintiff's case be proved, then defendants fired her from a position that had never (at least in recent memory) had policy-making responsibilities, then added such powers to the job in an attempt to legitimize the firing. In these circumstances, plaintiff has shown enough to warrant a jury trial.